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A TREATISE

UPON

THE LAW

OF

EMINENT DOMAIN.

BY

HENRY E. MILLS.

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PREFACE.

OVER five years ago, it was suggested to the author that the Law of Eminent Domain was of sufficient importance and extent to justify a separate treatise upon the subject. Further examination developed the fact that the practitioner, in investigating almost any branch of the subject, would be compelled to apply himself to the multitudinous volumes of reports. The only collections of authorities to be found were in the law periodicals, and in occasional chapters in text-books devoted to constitutional law, the law of railways, and of municipal corporations. On a careful search into the cases on the subject, both in the American and English reports, the author found more than three thousand two hundred decisions, which are cited in the following pages, many of the decisions being cited several times.

If the author had indulged liberally in quotations from decisions, the volume could have been easily swelled to twice its present size; but it was considered preferable, in most cases, to state the ultimate conclusions of the court, in a form as condensed as would be consistent with perspicuity. Some subjects related to the Law of Eminent Domain were suggested as proper to be considered in a treatise upon this subject. Among these were the acquisition of rights in real property by reason of the dedication

of the owner; the acquisition of prescriptive rights in property by the public, or by corporations authorized to hold property for *quasi*-public uses; and the general subject of assessment of benefits for local improvements. An adherence to the definition of Eminent Domain as the power to condemn private property for public use, called for the elimination of the consideration of rights obtained by dedication and prescription. The assessment of benefits for local improvements is certainly to be referred to the power of taxation, in all cases where no land is taken from the owner upon whom the benefit is assessed. But whenever the benefit is deducted from the compensation for land or materials taken, or whenever the benefit is considered in arriving at the "just compensation" secured to the subject, when his property is taken by the public, then the benefit has been treated of in this work.

The history of the exercise of the power of Eminent Domain in the United States is the history of the material development of the country. The great bulk of the cases have appeared within the last forty years. Prior to that time, the opening of highways and the erection of mills gave rise to an occasional discussion of this branch of the law. The era of railroad and canal-building has thronged the courts with cases; and the magnitude of the interests involved has demanded and secured for them the attention of counsel of great ability, as well as the careful consideration of the most learned judges on the bench. Later legislation, and constitutional enactments, have somewhat simplified the law and settled doubtful questions; but, notwithstanding this assistance, the law, as declared by the courts, is far from being uniform or

symmetrical. It is hoped that this treatise will give the profession a more complete view of the law of the subject than has hitherto been attainable, and that the systematization of the law and the definition of its boundaries will thereby be furthered.

H. E. M.

St. Louis, May 1, 1879.

TABLE OF CONTENTS.

CHAPTER I.

DEFINITIONS.

SECTION 1. Definitions and sources of power.
2. Distinction between the power of eminent domain and that of taxation.
3. Taking by virtue of the war power.
4. Taking by virtue of overruling necessity.
5. Destruction of buildings to prevent the spread of conflagration.
6. Condemnation of property as a nuisance.
7. Interference with property by the police power.
8. Forfeiture for violation of law.
9. Regulation of the use of private property.

CHAPTER II.

OF USES CONSIDERED PUBLIC.

SECTION 10. Whether the use is public — Province of the legislature.
11. The propriety or policy of the condemnation not a judicial question.
12. How many people must use, in order to make the use public.
13. The public need not own nor operate the improvement — Incidental private advantage.
14. Means of transportation — Railroads, canals, ferries, roads, and bridges.
15. Public character of mills.
16. Draining of marshes — Reclaiming land.
17. School-houses.
18. Facilities for public health or recreation — Parks — Water-works.
19. Burying-grounds.
20. Encouragement of mines.
21. Improvements unknown to the framers of the Constitution — Miscellaneous public uses.

CHAPTER III.

Of Uses considered Private.

Section 22. Condemnation for private use.
23. Condemnation of property for sale or for use by others.
24. Inducements to declare use public — Donations of land — Payment of damages by individuals.
25. Settlement of private disputes — Sales of land of minors.
26. Private or neighborhood roads.
27. Roads denominated private which the public may use.
28. Lateral railroads.
29. Ways of necessity.

CHAPTER IV.

Of what constitutes a Taking.

Section 30. Injury or depreciation of property.
31. Taking an easement.
32. Additional burden of railroad upon highways, turnpikes, and canals.
33. Highway an additional burden on a railroad.
34. Turnpike not an additional burden on public road.
35. Ferry-landing additional burden on highway.
36. Preliminary survey not a taking.

CHAPTER V.

Impairment of Rights secured by Contracts and Charters.

Section 37. Impairment of private contracts.
38. Interference with rights secured by charters.
39. Charters not in terms exclusive.
40. Legislative contract not to condemn.
41. Condemnation of the property of a corporation.
42. Condemnation of a franchise.
43. Impairment of the enjoyment of a franchise, and regulation of the use of it.
44. Condemning a use of the property of a corporation.
45. Condemnation of property devoted to another public use.
46. Express legislative authority.
47. Condemnation under general laws of property devoted to another public use — Priority of location.

CHAPTER VI.

Extent of Authority to Condemn.

Section 48. Authority to condemn not presumed.
49. Extent of interest condemned.
50. A fee may be condemned.
51. Fee in public roads and streets.
52. Minerals in land taken for street.
53. Timber and grass in highways.
54. Materials and buildings in highway.
55. Public use of a highway — Construction of sewers, drains, markets, etc.
56. Use of highway by adjoining owner.
57. Cessation of public use — Reversion to owner.
58. Power exhausted by one exercise — Limitations as to time and amount.
59. Necessary and convenient buildings — Maintenance — Repairs — Side tracks, telegraph lines, etc.

CHAPTER VII.

Of Delegation of the Power of Eminent Domain.

Section 60. The power may be delegated — Delegation to engineers — Contractors.
61. Delegation to corporations.
62. Discretion to be exercised — Selection of route.
63. Condemnation by corporation after sale or lease of its property — Rights of vendee.
64. Immunity of officers engaged in condemnation from actions of trespass.

CHAPTER VIII.

Of the Interests and Ownerships which may be affected by Condemnation.

Section 65. What persons are considered "owners."
66. Vendor and vendee — Change of title.
67. Change of title by death — Claims of heirs and administrators.
68. Landlord and tenant.
69. Landlord and tenant — Apportionment of rent.

SECTION 70. Landlord and tenant — Rebuilding when part of leased buildings are taken.
71. Dower interest — Separate property of wife — Homestead.
72. Infants.
73. Joint interests — Tenants for life — Remainder-men — Residuary legatees.
74. Rights of holders of encumbrances and liens — Judgment-liens.
75. Legal and equitable titles — Trustees and *cestuis que trust* — Receivers — Guardians.
76. Unknown owners — Conflicting claims — Payment into court.
77. Duty of condemning party to ascertain ownership of property taken.

CHAPTER IX.

OF THE RIGHTS OF RIPARIAN OWNERS.

SECTION 78. Interference with tide-waters.
79. Rights of riparian owners.
80. Improvement of navigable rivers.
81. Diversion of streams — Improvement of streams not navigable.
82. Rights between low and high water-mark.
83. Rights of owners on lakes and great ponds.

CHAPTER X.

OF THE REMEDIES PROVIDED BY THE STATE AND OPEN TO THE OWNER.

SECTION 84 Remedy to be provided by the legislature.
85. The assessment of damages under judicial control.
86. Disqualification of court on account of interest.
87. Statutory remedy is exclusive.
88. Where the statutory remedy is not complete, the common-law remedy survives.
89. The initiative in proceedings — Where the condemning party alone may institute proceedings — Where the owner alone may institute — Where either party may institute.
90. Remedy of owner, where condemning party does not follow statutory remedy.
91. Not necessary that the assessment should be by a jury.
92. Rules governing proceedings — Open and close — Change of venue — References — Due process of law.
93. Effect of subsequent legislation on proceedings — Reversal of proceedings.

CHAPTER XI.

Of Notice of Proceedings.

SECTION 94. Notice not absolutely necessary.
95. Notice generally required, to give jurisdiction.
96. Necessity of notice inferred from provisions of the statute.
97. Appearance — Waiver of notice.
98. Notice by publication and by posting.
99. Reasonable notice.
100. What the notice should contain.
101 Return of service of notices.
102. New notice of new proceedings.
103. Notice to known owners.
104. Notice to unknown owners.

CHAPTER XII.

Of the Necessity of Efforts to agree on Compensation, and of Contracts between the Parties.

SECTION 105. Property should be purchased.
106. Tender of amount of damages.
107. The effort to agree should appear affirmatively on the record.
108. Election not to agree — Inability to agree.
109. Waiver of agreement.
110. Contracts for rights of way.
111. Relinquishment of damages — Licenses to owners — Licenses granted by owner.
112. Reservations to owner — Easements not to be granted in lieu of damages, against the will of owner.
113. How contracts are to be enforced — Damages for breaches of contract.
114. Construction of contracts.

CHAPTER XIII.

Description of Property to be Taken.

SECTION 115. Certainty of description required.
116. Filing survey.
117. Maps.
118. Map need not show whole road, or entire tracts of land.
119. Quality of land — Improvements.
120. Exemption of dwelling-houses from condemnation — Dwelling-house defined.

SECTION 121. Exemption of gardens, yards, orchards, and manufactories from condemnation.
122. Variation of location and occupation.
123. Necessary materials.

CHAPTER XIV.

OF THE TIME AND MANNER OF MAKING COMPENSATION.

SECTION 124. Early doctrine that compensation need not precede taking.
125. Public roads under proprietary governments — Roads on wild land.
126. Distinction between a taking by the state or a municipal subdivision and a taking by private corporations.
127. Prepayment of damages which cannot be estimated — Imperative necessity.
128. Statutes or charters failing to provide compensation do not authorize the exercise of eminent domain.
129. Preliminary occupation.
130. Payment a condition precedent to entry.
131. Judgment not compensation.
132. Right to sue not compensation.
133. Consideration of public welfare not compensation.
134. Consent of authorities cannot affect the payment of damages.
135. Compensation in money — Just compensation.
136. Bond to secure damages — Bond pending appeal
137. Entry pending appeal.
138. Deposit pending an appeal.
139. Tender pending an appeal.
140. Waiver of prepayment by allowing entry to be made.
141. Continued assent to use.
142. Where original entry is lawful — Delay in perfecting title.
143. Acquiescence not a waiver of damages.
144. Lien on land for compensation — Change of corporations — Subsequent purchaser of franchise.
145. Refusal of officers to pay compensation assessed.
146. Payment to wrong claimant.
147. Refusal to take money — Failure to claim.
148. Ownership of improvements made during unlawful occupation.

CHAPTER XV.

OF BENEFITS AS AN ELEMENT OF COMPENSATION.

SECTION 149. Power to deduct benefits from compensation.
150. Classes of benefits.
151. Payment in benefits.

SECTION 152. Benefits allowed in reduction of damages must be direct and peculiar.
153. General benefits not to be considered.
154. Benefit to railroad of establishment of a highway.
155. From what time shall benefits be calculated.
156. Privilege of giving up entire lot and escaping assessment.
157. Where use of property is limited — Increase of business — *Expert testimony*.
158. Setting off benefits against disadvantages.

CHAPTER XVI.

OF THE NATURE AND AMOUNT OF DAMAGES.

SECTION 159. Adequacy of damages.
160. Title a proper subject of inquiry in determining damages.
161. Condemning party cannot dispute title.
162. Direct damages — Disadvantages.
163. Exposure to fire.
164. Jury or commissioners to determine the damages.
165. Testimony as to the amount of damages.
166. Effect of taking a part on the land left.
167. Damage to tract — Extent of tract — Separate blocks.
168. Market value.
169. Expert witnesses.
170. Sales of similar property.
171. Rents of similar property.
172. Evidence of assessment for taxation — Of commissioners' report — Admissions of owner.
173. Value not estimated solely from present use.
174. Assessment should be of the value at the time of taking.
175. Interest on award.
176. Interference with use before taking.
177. Interference with use during construction — Loss of profits.
178. On a taking subsequent to the improvement.
179. Taking part of a railroad.
180. Plan of proposed improvement.

CHAPTER XVII.

OF DAMAGES CONSIDERED CONSEQUENTIAL.

SECTION 181. Consequential injury to private property.
182. Legislative authority does not preclude claim for damages — Private inconveniences for the general good.
183. Injury to individual where no land is taken.
184. Reasonable use of adjoining property.

SECTION 185. Excavations on adjoining lands.
186. Blasting on adjoining lands.
187. Effect of structures on adjoining lands.
188. Cut through a natural barrier.
189. Interference with the flow of surface-water.
190. Discharging contents of sewer, or water-course, or of canal, on land.
191. Diversion of trade — Loss of profits.
192. Interruption of business.
193. Noise — Smoke — Frightening horses — Vibration.
194. Statutes allowing damages considered consequential.

CHAPTER XVIII.

OF THE USES TO WHICH HIGHWAYS AND STREETS MAY BE PUT — CHANGES OF GRADE — RAILROADS IN STREETS.

SECTION 195. Changes of grade.
196. Dissenting views.
197. Statutes allowing damages for changes of grade.
198. Restoring property to former condition.
199. Change rendered necessary by railroad track.
200. Use of streets by railroads.
201. Railroad an improved method of use.
202. Legislative control over streets and highways.
203. Where the fee of streets is in the city or in the public.
204. Where the fee is in the adjoining owner.
205. Horse-railroads.
206. Easement of adjoining owner in the street a valuable property.
207. Inconvenience of access — Embankments in streets — Obstruction of ingress and egress to property.

CHAPTER XIX.

OF THE CONTROL OF RAILROAD COMPANIES OVER RIGHTS OF WAY, AND OF THEIR DUTIES IN RELATION THERETO.

SECTION 208. Railroad to have exclusive control over right of way.
209. Telegraph line an encroachment — Railroad company may erect telegraph line.
210. Materials in right of way.
211. Track need not be in centre of right of way — Obstruction of private ways.
212. Fencing.
213. Farm-crossings.
214. Failure of company to make crossings.
215. Bridges over cuts — Ditches.

CHAPTER XX.

Of the various Damages presumed to be included in the Assessment.

Section 216. All damages presumed to have been considered in the assessment.
217. Damages arising afterward — Unforeseen damages.
218. Assessment after construction of the improvement.
219. Change in plan after assessment.
220. No compensation for damages caused by negligent or tortious acts.
221. Damages while land is unlawfully occupied.
222. Trespasses on lands adjoining.
223. Value of erections on land condemned — Ownership of buildings.
224. Continuing buildings already commenced.
225. Buildings on streets not laid out — Dedication by plat.

CHAPTER XXI.

Of the Assessment of Damages by Commissioners.

Section 226. Appointment of commissioners.
227. Disinterested persons — Freeholders.
228. Oath of commissioners.
229. Place and time of meeting — Adjournments.
230. Power of majority of commissioners to act.
231. Vacancy in board.
232. Supervision of court over proceedings of commissioners.
233. Control of the commissioners over proceedings — Application to commissioners.
234. Prejudice of commissioners.
235. Conversing or discussing with commissioners.
236. Treating and entertaining commissioners.
237. Evidence before commissioners — Admissibility.
238. Record of commissioners.
239. Preserving rulings and evidence.
240. When report should be made.
241. Review of report — Recommitting report.
242. How to obtain a review.
243. Presumption in favor of the regularity of action of commissioners.
244. Irregularity in arriving at the amount of damages.
245. Wrong principle in estimating.
246. Error in amount of damages — Itemized findings.

CHAPTER XXII.

Of the Assessment of Damages by a Jury.

Section 247. How the jury should be summoned.
248. Qualifications of jurors — Freeholders.
249. Disqualification from interest.
250. Swearing jury.
251. Obje tions to jurors.
252. Submission of similar issues to same jury.
253. Sources of information.
254. Jury of viewers.
255. Proceedings before jury — Practice — Evidence.
256. Decision of majority.
257. Itemizing verdict — Averaging.
258. Conditions in verdicts.
259. Setting aside verdict of jury.
260. Reassessment by jury.

CHAPTER XXIII.

Of Parties to Proceedings.

Section 261. Joinder of defendants.
262. Tenants in common.
263. Joint interests.
264. Town a proper party.
265. Parties pursuing statutory authority not tort-feasors.
266. Equity may bring in all parties.
267. Separate assessments, verdicts, and appeals.
268. Who may appeal.
269. Who are "interested or aggrieved" — Interest of tax-payers.

CHAPTER XXIV.

Of Proceedings in opening Highways and Streets.

Section 270. Application for road.
271. Petition of householders or freeholders.
272. Refusal of officers to lay out roads.
273. Road an encumbrance on land.
274. Ability of public to maintain road.
275. Public necessity — Public convenience.
276. Extent of easement.
277. Description of road.

SECTION 278. *Termini* should be certain.
279. *Terminus* need not be on highway.
280. Course of road.
281. Widening and straightening roads and streets.
282. Alteration of road.
283. The road must be laid out as petitioned for.
284. The road must be built as laid out.
285. Entry on adjoining land — Removal of fences.
286. Certificate of opening.

CHAPTER XXV.

OF PROCEEDINGS UNDER THE MILL ACTS.

SECTION 287. Public character of mills.
288. Necessity of mill — Private inconvenience.
289. Effect upon health — Rights of fishery.
290. Conflicting applications — Improvement by owner — Prescriptive rights.
291. Mill act excludes common-law remedy.
292. Where the statutory remedy is not adequate — Failure to comply with statute.
293. Act protects from indictment.
294. How damages are determined.
295. Questions before the jury — Nature of damages.
296. Damages to mill-site — Damages below dam.
297. Damages not authorized by charter.
298. Inconveniences.
299. Annual damages.
300. Benefits to be considered.
301. Use, by owner, of land flowed.
302. Reservoir for dam — Outlets.
303. Height of mill-dam.
304. Mill must be built.
305. All owners of mills to be joined — Owners of lands.
306. Transfer of dam — Liability of vendee of dam.
307. Transfer of land flowed — Claim for damages by vendor and vendee.
308. Regularity of proceedings — Waiver of errors.
309. Abandonment of proceedings.
310. Limitations on actions and on payment of damages.

CHAPTER XXVI.

OF ABANDONMENT OF PROCEEDINGS AND DISCONTINUANCE OF PUBLIC IMPROVEMENTS.

SECTION 311. Proceedings may be abandoned.

SECTION 312. Proceedings cannot be abandoned after report is confirmed.
313. Delay in determining whether or not proceedings shall be abandoned.
314. Discontinuance or abandonment as to a part.
315. Experimental assessments.
316. Right of owner to improve property pending proceedings.
317. Discontinuance of public improvements.
318. Discontinuance of roads and streets.
319. Where no entry has been made.
320. Evidence of abandonment — Non-user.
321. Relocation.

CHAPTER XXVII.

OF PROCEEDINGS SUBSEQUENT TO THE ASSESSMENT OF DAMAGES — APPEALS AND REVISION OF PROCEEDINGS.

SECTION 322. Right to appeal.
323. Errors to be taken advantage of by appeal.
324. Waiver of irregularities in proceedings.
325. Waiver of right of trial by jury.
326. Errors waived by condemning party.
327. Timely objection to irregularities.
328. Claim of damages.
329. Receipt of damages.
330. Failure to find damages, a judgment.
331. *Mandamus* to compel finding.
332. Subsequent proceedings do not cure former defects.
333. *Certiorari*.
334. Deed to condemning party — Obtaining possession.

CHAPTER XXVIII.

OF COSTS OF PROCEEDINGS.

SECTION 335. Costs of condemnation.
336. What costs allowed.
337. Costs in discretion of trial court.
338. Costs to prevailing party.
339. Services of county commissioners.

CHAPTER XXIX.

ON LIMITATIONS TO ACTIONS AND PROCEEDINGS.

SECTION 340. Prompt adjustment necessary.

SECTION 841. From what time the limitation should run.
842. Evidence of taking.
843. Limitation on pendency of proceedings.
844. Limitation on reports, appraisements, and appeals.
845. Excuses for failure to comply with statute.
846. Absence of special statute of limitations.

CHAPTER XXX.

OF CONDEMNATION BY THE FEDERAL GOVERNMENT AND OF PUBLIC LANDS.

SECTION 847. Federal government has power to condemn.
848. Clause in Constitution of the United States.
849. Removal of condemnation proceedings to United States courts.
850. Condemnation of land belonging to the Federal government.
851. Condemnation of land owned by state or municipality.
852. Condemnation by corporation of another state.
853. Bridges between states.

CHAPTER XXXI.

OF DRAINAGE AND SEWERAGE ACTS.

SECTION 854. Improvement of swamps — Sewers.
855. Private drains.
856. Application.
857. Nature and extent of damages.
858. Pollution of stream.
859. Hearing before jury.
860. Act to be confined to drainage purposes.

TABLE OF CASES CITED.

Abbott *v.* Penobscot, 52 Me. 584, §§ 336, 338.
—— *v.* Stewartstown, 47 N. H. 228, § 81.
—— *v.* Upham, 18 Metc. 172, § 306.
Abrahams *v.* Mayor of London, 37 L. J. (Ch.) 732, § 267.
Acton *v.* Blundell, 12 Mee. & W. 324, § 81.
Adams *v.* Emerson, 6 Pick. 57, § 53.
—— *v.* Hastings R. R., 18 Minn. 260, § 90.
—— *v.* Saratoga R. R., 10 N. Y. 328, § 95.
Adden *v.* White Mountains R. R., 55 N. H. 413, §§ 152, 168.
Aken *v.* Parfrey, 35 Wis. 249, § 303.
Akin *v.* Davis, 11 Kan. 580, § 308.
Akron *v.* McComb, 18 Ohio, 229, § 196.
Alabama R. R. *v.* Burkett, 42 Ala. 88, §§ 49, 135, 149, 165; *s. c.*, 46 Ala. 569, § 193.
—— *v.* Kenney, 39 Ala. 307, § 87.
Albany R. R. *v.* Dayton, 10 Abb. Pr. (N. S.) 182, § 246.
—— *v.* Brownell, 24 N. Y. 345, §§ 33, 43.
—— *v.* Lansing, 16 Barb. 68, §§ 92, 166, 233.
Albany St. (Matter of), 11 Wend. 149 §§ 23, 178.
Aldrich *v.* Drury, 8 R. I. 554, § 210.
—— *v.* Cheshire R. R., 21 N. H. 359, §§ 64, 87, 185, 216.
Aldridge *v.* Tuscumbia R. R., 2 Stew. & P. 199, §§ 11, 12.
Alexander *v.* Baltimore, 5 Gill, 383, § 61.
—— *v.* Milwaukee, 16 Wis. 247, §§ 185, 188, 195.
Alexander *v.* West End & Crystal Palace Co., 31 L. J. (Ch.) 500, § 120.
Allen *v.* Androscoggin R. R., 60 Me. 494, § 239.
—— *v.* Charlestown, 109 Mass. 243, §§ 152, 158.
—— *v.* Drew, 44 Vt. 174, § 2.
—— *v.* Jones, 47 Ind. 438, § 48.
—— *v.* Stevens, 29 N. J. L. 509, § 27.
Allison *v.* Commissioners, 54 Ill. 170, § 229.
Allyn *v.* Providence R. R., 4 R. I. 457, §§ 66, 146.
Alton R. R. *v.* Baugh, 14 Ill. 211, §§ 212, 218.
American Print Works *v.* Lawrence, 23 N. J. L. 590. §§ 5, 64.
Ames *v.* Lake Superior R. R., 21 Minn. 241, §§ 85, 91.
Amoskeag Co. *v.* Goodale, 46 N. H. 53, § 88.
Anderson *v.* Kerns Draining Co., 14 Ind. 199, § 16.
—— *v.* St. Louis, 47 Mo. 479, §§ 90, 102.
—— *v.* Turbeville, 6 Coldw. 150, §§ 10, 11, 95, 128, 206, 268.
—— *v.* Wood, 80 Ill. 15, § 97.
Anderson R. R. *v.* Kernodle, 54 Ind. 314, § 90.
Andover *v.* Sutton, 12 Metc. 182, §§ 15, 292, 297.
Anthony *v.* Lawhorne, 1 Leigh, 1, § 160.
Anthony St. (Matter of), 20 Wend. 618, §§ 311, 312.
Antoinette St., 8 Phila. 461, § 246.
Appleby Road, 1 Grant, 443, § 268.

Appointment of Viewers, Wyoming Common Pleas, 4 Leg. Gaz. 410, §§ 17, 49.
App's Road, 17 Serg. & R. 388, §§ 227, 275.
Arimond *v.* Green Bay Co., 31 Wis. 316, § 30.
Armington *v.* Barnett, 15 Vt. 745, § 42.
Armstrong *v.* St. Louis, 8 Mo. App. 151, § 195.
Arnold *v.* Covington Bridge, 1 Duv. 372, §§ 14, 185, 174.
—— *v.* Decatur, 29 Mich. 77, §§ 107, 275.
—— *v.* Hudson R. R., 55 N. Y. 661, § 31.
—— *v.* Klepper, 24 Mo. 272, § 297.
Art St. (Matter of), 20 Wend. 685, §§ 67, 76.
Ash *v.* Cummings, 50 N. H. 591, §§ 36, 64, 89, 124, 126, 127.
Ashby *v.* Eastern R. R., 5 Metc. 368, §§ 183, 263.
Astor *v.* Hoyt, 5 Wend. 603, §§ 65, 74.
—— *v.* Mayor of New York, 5 Jones & Sp. 539, §§ 149, 256.
Atchison R. R. *v.* Blackshire, 10 Kan. 477, §§ 159, 162.
—— *v.* Garside, 10 Kan. 552, § 208.
—— *v.* Weaver, 10 Kan. 344, § 87.
Atkinson *v.* Marietta R. R., 15 Ohio St. 21, §§ 58, 63.
Atlantic R. R. *v.* Campbell, 4 Ohio St. 583, § 165.
—— *v.* Commissioners, 51 Me. 36, § 95.
—— *v.* Cumberland Commissioners, 28 Me. 112, § 339.
—— *v.* Fuller, 48 Ga. 423, § 89.
—— *v.* Mann, 43 Ga. 200, § 46.
—— *v.* Sullivant, 5 Ohio St. 276, §§ 61, 115.
Atlantic Telegraph Co. *v.* Chicago R. R., 6 Biss. 158, §§ 208, 209, 350.
Attorney-General *v.* Passenger R. R., 32 Leg. Int. (Pa.) 238, § 202.
—— *v.* Turpin, 3 Hen. & M. 548, § 50.
Auditor *v.* Crise, 20 Ark. 540, § 161.
Augusta *v.* Marks, 50 Ga. 612, § 158.
Aurora *v.* West, 9 Ind. 74, § 2.
Aurora R. R. *v.* Miller, 56 Ind. 88, § 61.
Austin *v.* Allen, 6 Wis. 134, § 100.
—— *v.* Helms, 65 N. C. 560, § 230.
—— *v.* Murray, 16 Pick. 121, § 6.
—— *v.* Rutland R. R., 45 Vt. 215, §§ 73, 142.
Avery *v.* Fox, 1 Abb. U. S. 246, §§ 60, 80, 182.
—— *v.* Groton, 36 Conn. 304, § 251.
—— *v.* Police Jury, 12 La. An. 554, § 81.
—— *v.* Van Deusen, 5 Pick. 182, § 300.

Babb *v.* Carver, 7 Wis. 124, § 100.
Babcock *v.* Western R. R., 9 Metc. 553, § 110.
Backus *v.* Lebanon, 11 N. H. 19, §§ 40, 42, 87, 91.
Baddeley, *Ex parte*, 5 Dow. & L. 575, § 227.
Bagnall *v.* London, etc., Rail. Co., 31 L. J. (Exch. Ch.) Exch. 480, § 189.
Bailey *v.* Mayor of New York, 3 Hill, 531, § 220.
—— *v.* Miltenberger, 31 Pa. 87, § 87.
—— *v.* Philadelphia R. R., 4 Harr. 389, § 80.
Baird *v.* Hunter, 12 Pick. 556, § 304.
Baker *v.* Boston, 12 Pick. 184, § 7.
—— *v.* Braman, 6 Hill, 47, § 26.
—— *v.* Chicago R. R., 57 Mo. 265, § 113.
—— *v.* Holderness, 26 N. H. 110, § 91.
—— *v.* Johnson, 2 Hill, 342, §§ 50, 216.
—— *v.* Runnels, 12 Mc. 235, § 64.
—— *v.* Shephard, 24 N. H. 208, § 53.
Balch *v.* Commissioners of Essex, 103 Mass. 106, §§ 18, 19, 108.
Baldwin *v.* Bangor, 36 Me. 518, § 242.
—— *v.* Buffalo, 35 N. Y. 375, § 243.
—— *v.* Calkins, 10 Wend. 167, § 227.
Baldwin Road, 3 Grant, 62, § 344.
Ballard *v.* Ballard Vale Co., 5 Gray, 468, § 307.
Balls *v.* Metropolitan Board of Works, L. R. 1 Q. B. 337, § 338.

Balls *v.* Metropolitan Rail Co., 35 L. J. (Q. B.) 101, § 338.
Baltimore *v.* Clunet, 23 Md. 449, § 156.
—— *v.* Grand Lodge, 44 Md. 436, § 95.
Baltimore Turnpike, 5 Binn. 481, § 230.
—— *v.* Union R. R., 35 Md. 224, §§ 42, 46.
Baltimore R. R. *v.* Chase, 43 Md. 23, § 79.
—— *v.* Highland, 48 Ind. 381, § 113.
—— *v.* Lansing, 52 Ind. 229, §§ 166, 212.
—— *v.* Magruder, 34 Md. 79, §§ 81, 216.
—— *v.* Nesbit, 10 How. 395, §§ 93, 311, 313.
—— *v.* Strauss, 37 Md. 237, § 141.
—— *v.* Thompson, 10 Md. 76, §§ 68, 193.
Bangor R. R. *v.* McComb, 60 Me. 290, §§ 22, 159, 162, 163, 166, 175, 220.
Bankhead *v.* Brown, 25 Iowa, 540, §§ 10, 11, 20, 26.
Bank of Auburn *v.* Roberts, 44 N. Y. 192, § 74.
Banks *v.* Ogden, 2 Wall. 57, § 79.
Barber *v.* Andover, 8 N. H. 398, §§ 42, 45, 46.
Barclay *v.* Howell's Lessee, 6 Pet. 498, §§ 51, 52, 53, 56.
Barker *v.* Taunton, 119 Mass. 392, §§ 111, 153, 197, 341.
Barlow *v.* Chicago R. R., 29 Iowa, 276, § 320.
Barnard *v.* Fitch, 7 Metc. 605, § 304.
—— *v.* Haworth, 9 Ind. 103, § 26.
Barnett *v.* The State, 15 Ala. 829, § 333.
Barnsley Canal Co. *v.* Twibell, 13 L. J. (Ch.) 434, § 52.
Barr *v.* Oskaloosa, 45 Iowa, 275, §§ 203, 318.
Barre Turnpike Co. *v.* Appleton, 2 Pick. 430, § 97.
Barrickman *v.* Commissioners, 11 Gill & J. 50, § 164.
Barron *v.* Baltimore, 7 Pet. 243, § 348.
Barter *v.* The Commonwealth, 3 Pen. & Watts, 253, § 55.
Bastable *v.* Syracuse, 15 N. Y. Sup. Ct. 587, § 189.
Bateman *v.* Bluck, 18 Q. B. 870, § 279.
Bates *v.* Ray, 102 Mass. 458, § 298.
Battles *v.* Braintree, 14 Vt. 348, §§ 88, 319.
Beale St. (Matter of), 39 Cal. 495, §§ 195, 197, 245.
Bean *v.* Hinman, 33 Me. 480, § 306.
Beardsley *v.* Washington, 39 Conn. 265, § 236.
Bechnel *v.* New Orleans R. R., 28 La. An. 522, § 113.
Beckett *v.* Midland Rail. Co., L. R. 3 C. P. 82, § 207.
Beckwith *v.* Beckwith, 22 Ohio St. 180, §§ 64, 128, 281.
Beekman *v.* Saratoga R. R., 3 Paige, 45, §§ 11, 14, 40, 60, 91.
Bell *v.* Hull Rail. Co., 6 Mee. & W. 699, § 79.
—— *v.* Ohio R. R., 1 Grant, 105, § 65.
—— *v.* Wilson, 13 W. R. 708; 35 L. J. (Ch.) 337, § 52.
Bellinger *v.* New York Central R. R., 23 N. Y. 42, § 189.
Bellona Co.'s Case, 3 Bland, 442, §§ 41, 61.
Bemis *v.* Springfield, 122 Mass. 110, § 198.
Benden *v.* Nashua, 17 N. H. 477, § 199.
Benedict *v.* Goit, 3 Barb. 459, § 34.
Benham *v.* Dunbar, 103 Mass. 365, § 170.
Benjamin *v.* Wheeler, 8 Gray, 409, § 64.
Bennett *v.* Boyle, 40 Barb. 551, § 223.
—— *v.* Camden R. R., 14 N. J. L. 145, §§ 228, 284, 333.
Bennitt *v.* Whitehouse, 29 L. J. (Ch.) 326, § 52.
Bensley *v.* Mountain Water Co., 13 Cal. 306, §§ 174, 313.
Benson *v.* Mayor of New York, 10 Barb. 223, § 351.
Bergman *v.* St. Paul R. R., 21 Minn. 533, § 313.

Bertsch *v.* Lehigh Co., 4 Rawle, 180, § 219.
Betts *v.* New Hartford, 25 Conn. 180, § 326.
—— *v.* Williamsburgh, 15 Barb. 255, § 149.
Biddle *v.* Dancer, 20 N. J. L. 633, § 280.
—— *v.* Hussman, 28 Mo. 597, §§ 65, 69.
Bigelow *v.* Newell, 10 Pick. 348, § 296.
—— *v.* Mississippi R. R., 2 Head, 624, § 105.
—— *v.* Wisconsin R. R., 27 Wis. 478, §§ 159, 166.
—— *v.* Cambridge Turnpike Co., 7 Mass. 202, § 88.
Bingham *v.* Doane, 9 Ohio, 165, §§ 56, 206.
Binney's Case, 2 Bland, 99, § 1.
Bird *v.* Great Eastern Rail Co., 34 L. J. (C. P.) 366, §§ 31, 65, 162.
Bissell *v.* Collins, 28 Mich. 277, § 54.
—— *v.* New York Central R. R., 23 N. Y. 61, § 204.
Black *v.* Delaware Canal Co., 22 N. J. Eq. 130, § 42.
Black River R. R. *v.* Barnard, 16 N. Y. Sup. Ct. 104, § 173.
Blackshire *v.* Atchison R. R., 18 Kan. 514, §§ 139, 312.
Blaisdell *v.* Winthrop, 118 Mass. 138, § 90.
Blake *v.* Rich, 84 N. H. 282, §§ 52, 53.
Blanchard *v.* Maysville Turnpike, 1 Dana, 86, § 143.
Bland *v.* Hixenbaugh, 39 Iowa, 532, §§ 151, 212.
Blesch *v.* Chicago R. W., 43 Wis. 183, §§ 89, 90, 204.
Bliss *v.* Hosmer, 15 Ohio, 44, §§ 60, 123.
Blodgett *v.* Utica R. R., 64 Barb. 580, § 221.
Bloodgood *v.* Mohawk R. R., 14 Wend. 51, § 142; 18 Wend. 9, §§ 11, 13, 14, 124.
Bloomfield Gas Co. *v.* Calkins, 62 N. Y. 386, § 55; 1 N. Y. Sup. Ct. 549, § 55.
Bloomfield Gas Co. *v.* Richardson, 63 Barb. 437, § 55.
Bloomington *v.* Miller, 84 Ill. 621, § 312.
Board of Commissioners *v.* Muhlenbacker, 18 Kan. 129, § 271.
—— *v.* Lansing, 45 N. Y. 19, § 230.
Bogert *v.* United States, 2 Ct. of Cl. 159, §§ 105, 348.
Boggs *v.* Merced Mining Co., 14 Cal. 279, § 347.
Bohlman *v.* Green Bay R. R., 30 Wis. 105, §§ 89, 130.
Bolling *v.* Mayor, 3 Rand. 563, §§ 52, 53, 56.
Bonaparte *v.* Camden R. R., Baldw. 205, §§ 11, 14, 36, 37, 61, 84, 90, 116, 124, 125, 132.
Booneville *v.* Ormrod's Admr., 26 Mo. 193, §§ 65, 67, 94, 96.
Booth *v.* Woodbury, 32 Conn. 118, § 2.
Boothby *v.* Androscoggin R. R., 51 Me. 318, § 185.
Bordentown Turnpike Co. *v.* Camden R. R., 17 N. J. L. 314, §§ 32, 193.
Boston *v.* Richardson, 13 Allen, 146, § 55.
Boston Gas-Light Co. *v.* Old Colony R. R., 14 Allen, 444, § 211.
Boston Mill Co. *v.* Gardner, 2 Pick. 33, § 194.
Boston Mill-Dam *v.* Newman, 12 Pick. 467, §§ 15, 301.
Boston R. R. (*In re*), 53 N. Y. 574, § 46.
—— *v.* Folsom, 46 N. H. 64, §§ 97, 279, 333.
—— *v.* Greenbush, 52 N. Y. 510, § 33.
—— *v.* Middlesex, 1 Allen, 324, §§ 110, 154, 282.
—— *v.* Montgomery, 119 Mass. 114, § 169.
—— *v.* Old Colony R. R., 12 Cush. 605, §§ 78, 173, 191, 207; 3 Allen, 142, §§ 44, 169, 170.
—— *v.* Salem R. R., 2 Gray, 1, §§ 41, 42, 46, 128.
—— *v.* Western R. R., 14 Gray, 253, § 44.
Boston Water-power Co. *v.* Boston R. R., 23 Pick. 360, §§ 42, 46, 60, 61.

Bottoms *v.* Brewer, 54 Ala. 288, §§ 81, 287.
Bouligny *v.* Dormenon, 2 Mart. (N. S.) La. 455, § 7.
Bourne *v.* Mayor of Liverpool, 33 L. J. (Q. B.) 15, § 68.
Boyd *v.* Negley, 40 Pa. 377, § 28; 53 Pa. 387, § 219.
Boynton *v.* Peterborough R. R., 4 Cush. 467, § 67.
Bradby *v.* Southampton Board of Health, 4 El. & Bl. 1014, § 330.
Bradley *v.* New York R. R., 21 Conn. 294, §§ 194, 207.
Bradshaw *v.* Rogers, 20 Johns. 103, § 1.
Brady *v.* Bronson, 45 Cal. 640, § 126.
—— *v.* Shinkle, 40 Iowa, 576, § 318.
Brainard *v.* Boston R. R., 12 Gray, 407, § 165.
—— *v.* Clapp, 10 Cush. 6, § 210.
—— *v.* Connecticut R. R., 7 Cush. 506, § 214.
—— *v.* Missisquoi R. R., 48 Vt. 107, §§ 82, 57, 317.
Brand *v.* City R. R., L. R. 2 Q. B. 223, § 198.
Brandon *v.* Brandon, 34 L. J. (Ch.) 333, § 68.
Brannan *v.* Mecklenburg, 49 Cal. 672, § 283.
Branson *v.* Philadelphia, 47 Pa. 329, § 31.
Bray *v.* South-Eastern Rail. Co., 19 L. J. (Q. B.) 11, § 336.
Breed *v.* Eastern R. R., 5 Gray, 470, § 74.
Brewer *v.* Bowman, 9 Ga. 37, § 26.
Bridge *v.* New Hampton, 47 N. H. 151, § 322.
Bridgeport *v.* New York R. R., 36 Conn. 255, §§ 46, 154.
Brigham *v.* Edmands, 7 Gray, 359, § 3.
—— *v.* Agricultural Branch R. R., 1 Allen, 316, § 58.
Brimmer *v.* Boston, 102 Mass. 19, §§ 40, 61, 64, 333.
Brinckerhoff *v.* Wemple, 1 Wend. 470, §§ 146, 262.
Brine *v.* Great Western Rail. Co., 31 L. J. (Q. B.) 101, § 220.
Brisbine *v.* St. Paul R. R., 23 Minn. 114, § 160.
Bristol *v.* Branford, 42 Conn. 321, §§ 274, 275.
Broadbent *v.* Imperial Gas Co., 26 L. J. (Ch.) 276, § 90.
Broadway Widening, 63 Barb. 572, §§ 230, 256; 61 Barb. 483, § 241.
Broad St. Road, 7 Serg. & R. 444, § 228.
Brock *v.* Hishen, 40 Wis. 674, §§ 126, 145.
Brocket *v.* Ohio R. R., 14 Pa. 241, § 94.
Brooks *v.* Boston, 19 Pick. 174, §§ 70, 192.
—— *v.* Davenport R. R., 37 Iowa, 99, §§ 159, 166.
Brooklyn Central R. R. *v.* Brooklyn City R. R., 32 Barb. 358, § 58; 33 Barb. 420, § 45.
Brooklyn City R. R. *v.* Coney Island R. R., 35 Barb. 364, § 39.
Brooklyn Heights (Matter of), 48 Barb. 288, § 225.
Brooklyn Park *v.* Armstrong, 45 N. Y. 234, §§ 11, 18, 50, 317.
Brown (*Re*), 1 Mac. & G. 201, § 75.
Brown *v.* Beatty, 34 Miss. 227, §§ 1, 13, 14, 61, 87, 135, 151.
—— *v.* Bridges, 31 Iowa, 138, § 284; 36 Iowa, 279, § 318.
—— *v.* Cayuga R. R., 12 N. Y. 487, § 81.
—— *v.* Cincinnati, 14 Ohio, 541, § 149.
—— *v.* Corey, 43 Pa. 495, §§ 28, 37.
—— *v.* Duplessis, 14 La. An. 842, § 205.
—— *v.* Essex, 12 Metc. 208, § 66.
—— *v.* Freeman, 1 Root (Conn.), 118, § 51.
—— *v.* Ipswich Manufacturing Co., 5 Gray, 460, § 259.
—— *v.* Lowell, 8 Metc. 172, § 197.
—— *v.* McCord, 20 Ind. 270, § 271.
—— *v.* Powell, 25 Pa. 229, §§ 68, 130.
—— *v.* Providence R. R., 5 Gray, 35, §§ 157, 172, 183, 186.
—— *v.* Worcester, 13 Gray, 31, § 112.
Brunswick R. R. *v.* McLaren, 47 Ga. 546, § 169.

Brush *v.* Detroit, 32 Mich. 48, § 268.
Bryan *v.* Burnett, 2 Jones L. 305, § 304.
Bryant *v.* Glidden, 36 Me. 36, §§ 234, 306.
Buckingham *v.* Smith, 10 Ohio, 288, § 23.
Buel *v.* Clark, 1 Root (Conn.), 49, § 51.
Buell *v.* Worcester, 119 Mass. 372, § 198.
Buffalo (Matter of City of), 68 N. Y. 167, § 46.
Buffalo R. R. *v.* Brainard, 9 N. Y. 100, §§ 14, 60, 61.
—— *v.* Ferris, 26 Texas, 588, §§ 14, 61, 91, 128, 131, 135, 149, 158.
Buffum *v.* New York R. R., 4 R. I. 221, § 169.
Bumpus *v.* Miller, 4 Mich. 159, § 346.
Burbridge *v.* New Albany R. R., 9 Ind. 546, §§ 65, 68.
Burden *v.* Stein, 27 Ala. 104, §§ 18, 79.
Burial Ground of St. Pancras (*Re*), 36 L. J. (Ch.) 52, § 173.
Burlington *v.* Gilbert, 31 Iowa, 356, § 197.
Burlington R. R. *v.* Sater, 1 Iowa, 421, § 311.
Burnett *v.* N. & C. R. R., 4 Sneed, 528, § 208.
Burns *v.* Annas, 60 Me. 288, § 60.
—— *v.* Milwaukee R. R., 9 Wis. 450, § 329.
Burrill *v.* Martin, 12 Me. 345, § 338.
Burritt *v.* New Haven, 42 Conn. 174, § 199.
Burt *v.* Brigham, 117 Mass. 307, § 108.
—— *v.* Merchants' Ins. Co., 106 Mass. 356, § 347; 115 Mass. 1, §§ 65, 174.
—— *v.* Wigglesworth, 117 Mass. 302, §§ 65, 92, 173.
Bushwick Ave., 48 Barb. 9, §§ 18, 246.
Butler *v.* Barr, 18 Mo. 357, §§ 64, 284.
—— *v.* Sewer Commissioners, 39 N. J. L. 665, § 135.
Butman *v.* Vermont Central R. R., 27 Vt. 500, §§ 219, 323.
Butterworth *v.* Bartlett, 50 Ind. 537, § 318.

Cadle *v.* Muscatine R. R., 44 Iowa, 11, § 200.
Cairo R. R. *v.* Turner, 31 Ark. 494, §§ 87, 124, 348.
Caldwell *v.* Bank, 20 Ind. 294, § 66.
Caledonia Rail. Co. *v.* Colt, 3 Macq. H. L. Cas. 833, § 220.
—— *v.* Ogilvy, 2 Macq. H. L. Cas. 229, §§ 183, 193, 207.
—— *v.* Lockhart, 3 Macq. H. L. Cas. 808, §§ 216, 237.
Calhoun *v.* Palmer, 8 Gratt. 88, § 217.
California R. R. *v.* Gould, 21 Cal. 254, § 350.
California Pacific R. R. *v.* Armstrong, 46 Cal. 85, § 149.
—— *v.* Central Pacific R. R., 47 Cal. 528, § 136.
—— *v.* Frisbie, 41 Cal. 356, § 239.
Calking *v.* Baldwin, 4 Wend. 667, §§ 87, 89.
Call *v.* Middlesex, 2 Gray, 232, §§ 217, 310.
Callison *v.* Hedrick, 15 Gratt. 244, §§ 34, 340.
Callender *v.* Marsh, 1 Pick. 417, §§ 181, 195.
—— *v.* Painesville R. R., 11 Ohio St. 516, § 122.
Cambria St., 75 Pa. 357, § 228.
Cambridge *v.* County Commissioners of Middlesex, 117 Mass. 79, §§ 330, 333
Cameron *v.* Supervisors, 47 Miss. 264, § 90.
Campau *v.* Detroit, 14 Mich. 276, § 91.
Canal Appraisers *v.* The People, 17 Wend. 571, § 80.
Canal Bank *v.* Albany, 9 Wend. 244, § 245.
Canal St. (Matter of), 11 Wend. 154, § 312.
Canal Co. *v.* Commissioners of Drainage, 26 La. An. 740, § 49.
Canandaigua R. R. *v.* Payne, 16 Barb. 273, § 159.

Canyonville Road *v.* Douglass County, 5 Oreg. 280, § 269.
Cape Girardeau Road *v.* Renfroe, 58 Mo. 265, § 34.
Carey, *ex parte*, 10 L. T. 37, § 69.
Carli *v.* Stillwater R. R., 16 Minn. 260, §§ 66, 153, 159, 160.
Carpenter *v.* Easton R. R., 24 N. J. Eq. 249, 408, § 166; 26 N. J. Eq. 168, § 219.
—— *v.* Grisham, 59 Mo. 247, § 64.
—— *v.* Jennings, 77 Ill. 250, § 149.
—— *v.* Landaff, 42 N. H. 218, §§ 152, 153.
—— *v.* Oswego R. R., 24 N. Y. 655, §§ 88, 202.
—— *v.* Sims, 3 Leigh, 675, § 212.
Carr *v.* Georgia R. R., 1 Ga. 524, §§ 87, 136.
—— *v.* Northern Liberties, 35 Pa. 324, § 195.
Carris *v.* Commissioners of Waterloo, 2 Hill, 443, § 120.
Carson *v.* Central R. R., 35 Cal. 325, §§ 203, 205.
—— *v.* Coleman, 11 N. J. Eq. 106, §§ 128, 149.
—— *v.* Western R. R., 8 Gray, 423, § 187.
Case *v.* Myers, 6 Dana, 330, § 95.
—— *v.* Thompson, 6 Wend. 634, § 95.
Cash *v.* Whitworth, 13 La. An. 401, § 125.
Cashman *v.* Wood, 13 N. Y. Sup. Ct. 520, § 67.
Castle *v.* Berkshire, 11 Gray, 26, § 318.
Cator *v.* Board of Works, 34 L. J. (Q. B.) 74, § 358.
Central Bridge *v.* Lowell, 15 Gray, 106, § 42; 4 Gray, 474, § 42.
Central Horse R. R. *v.* Ft. Clark Horse R. R., 81 Ill. 523, § 47.
Central Pacific R. R. *v.* Pearson, 35 Cal. 247, §§ 159, 169, 170, 173, 237, 239, 241.
Central R. R. *v.* Hetfield, 18 N. J. Eq. 323, § 211.
—— *v.* Holler, 7 Ohio St. 220, § 112.
Chagrin Falls Rd. Co. *v.* Cane, 2 Ohio St. 419, § 84.
Challiss *v.* Atchison R. R., 16 Kan. 117, §§ 11, 50.
Chamberlain *v.* West End Rail. Co., 31 L. J. (Q. B.) 201, §§ 183, 192.
Chambers *v.* Furry, 1 Yeates, 167, §§ 53, 56.
—— *v.* Satterlee, 40 Cal. 497, § 2.
Chandler *v.* Jamaica Pond Co., 122 Mass. 305, § 170.
Channel Co. *v.* Railroad, 51 Cal. 269, §§ 10, 20.
Chapin *v.* Boston R. R., 6 Cush. 422, §§ 112, 170.
—— *v.* Sullivan R. R., 39 N. H. 564, §§ 52, 210.
Chapman *v.* Albany R. R., 10 Barb. 360, § 199.
—— *v.* Gates, 54 N. Y. 132, §§ 126, 142.
—— *v.* Groves, 8 Blackf. 308, § 248.
—— *v.* Oshkosh R. R., 33 Wis. 629, §§ 32, 79, 158, 167.
—— *v.* Swan, 65 Barb. 210, § 230.
Charles *v.* Monson Mfg. Co., 17 Pick. 70, § 306.
Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, §§ 39, 41, 42, 43, 85, 88, 124, 181, 348; 7 Pick. 344, §§ 40, 191.
Charles River R. R. *v.* County Commissioners, 7 Gray, 389, § 233.
Charleston R. R. *v.* Blake, 12 Rich. L. 634, §§ 62, 92.
Charlestown Branch R. R. *v.* Middlesex, 7 Metc. 78, § 341.
Chase *v.* New York Central R. R., 24 Barb. 273, § 30.
—— *v.* Rutland, 47 Vt. 393, § 227.
—— *v.* Sutton Mfg. Co., 4 Cush. 152, § 32.
—— *v.* Worcester, 108 Mass. 60, § 198.
Chasemore *v.* Richards, 29 L. J. (Exch.) 81, § 81.
Chesapeake Canal Co. *v.* Baltimore R. R., 4 Gill & J. 1, §§ 38, 47.
—— *v.* Grove, 11 Gill & J. 398, § 216.
—— *v.* Key, 3 Cranch C. Ct. 599, §§ 84, 149.
—— *v.* Mason, 4 Cranch C. Ct. 128, § 49.

Chesapeake Canal Co. *v.* Union Bank, 4 Cranch C. Ct. 75, §§ 50, 84, 347.
—— *v.* Young, 3 Md. 480, § 113.
Chesapeake R. R. *v.* Bradford, 6 W. Va. 220, §§ 175, 312.
—— Pack, 6 W. Va. 397, § 246.
—— *v.* Patton, 6 W. Va. 147, §§ 112, 212.
Chess *v.* Manown, 3 Watts, 219, § 56.
Chicago *v.* Barbian, 80 Ill. 482, § 312.
—— *v.* Laflin, 49 Ill. 172, § 6.
—— *v.* Wheeler, 25 Ill. 478, § 175.
—— *v.* Wright, 69 Ill. 318, § 143.
Chicago R. R. *v.* Bull, 20 Ill. 218, §§ 130, 335.
—— *v.* Chamberlain, 84 Ill. 333, §§ 73, 74, 76, 107, 329.
—— *v.* Francis, 70 Ill. 238, §§ 151, 159.
—— *v.* Hurst, 30 Iowa, 73, § 263.
—— *v.* Joliet, 79 Ill. 25, §§ 201, 202, 203.
—— *v.* McGinnis, 79 Ill. 269, §§ 193, 207.
—— *v.* Melville, 66 Ill. 329, §§ 112, 135.
—— *v.* Patchin, 16 Ill. 198, § 208.
—— *v.* President Knox College, 84 Ill. 195, §§ 90, 142.
—— *v.* Sanford, 23 Mich. 418, §§ 91, 256, 267.
—— *v.* Smith, 78 Ill. 96, §§ 90, 103.
—— *v.* Springfield R. R., 67 Ill. 142, §§ 177, 180.
—— *v.* Stein, 75 Ill. 41, §§ 79, 80, 159.
—— *v.* Swinney, 38 Iowa, 182, § 71.
—— *v.* Wilson, 17 Ill. 123, §§ 58, 59.
Childs *v.* Central R. R., 33 N. J. L. 323, § 58.
Christy *v.* Newton, 60 Barb. 332, § 230.
Church *v.* Northern Central R. R., 45 Pa. 339, § 333.
Church Road, 5 Watts & S. 200. § 279.
Cincinnati *v.* Coombs, 16 Ohio, 181, § 88.
Cincinnati R. R. *v.* Danville R. R., 75 Ill. 113, § 47.
—— *v.* Longworth, 30 Ohio St. 108, §§ 166, 173.
City, Praying for Opening Streets, 20 La. An. 497, § 312.
Clack *v.* White, 2 Swan, 540, § 26.
Claiborne St. (Matter of), 4 La. An. 7, § 241.
Clapper, *ex parte*, 3 Hill, 458, § 121.
Clark *v.* Hampstead, 19 N. H. 365, § 319.
—— *v.* Hannibal & St. Joe R. R., 36 Mo. 202, § 216.
—— *v.* Miller, 54 N. Y. 528, § 260; 42 Barb. 255, § 260.
—— *v.* Phelps, 4 Cow. 190, § 48.
—— *v.* Saybrook, 21 Conn. 313, § 183.
—— *v.* Utica, 18 Barb. 451, § 91.
Clarke *v.* Blackmar, 47 N. Y. 150, § 21.
—— *v.* Gilmanton, 12 N. H. 515, § 72.
—— *v.* Rochester, 24 Barb. 446, § 61.
Clear Lake Water Co. (Matter of), 48 Cal. 586, § 233.
Clement *v.* Burns, 43 N. H. 609, §§ 278, 328.
—— *v.* Durgin, 5 Me. 9, § 111.
Cleveland *v.* Wick, 18 Ohio St. 303, § 149.
Cleveland R. R. *v.* Ball, 5 Ohio St. 568, § 166.
—— *v.* Prentice, 13 Ohio St. 373, § 122.
—— *v.* Speer, 56 Pa. 325, §§ 32, 59, 200.
Clifford *v.* Commissioners, 59 Me. 262, § 227.
—— *v.* Eagle, 35 Ill. 444, §§ 268, 278.
Clinton *v.* Cedar Rapids R. R., 24 Iowa, 455, § 203.
—— *v.* Horse R. W., 37 Iowa, 61, § 205.
Clough *v.* Unity, 18 N. H. 75, §§ 175, 319.
Coates *v.* Mayor of New York, 7 Cow. 585, § 6.
Cobb *v.* Smith, 16 Wis. 661, § 308.
—— *v.* Boston, 112 Mass. 181, §§ 168, 173.
Coburn *v.* Pacific Lumber Co., 46 Cal. 31, § 90.
Coe *v.* Columbus R. R., 10 Ohio St. 372, § 141.
Cogswell *v.* Essex Mill Co., 6 Pick. 94, § 88.
Colcough *v.* Nashville R. R., 2 Head, 171, §§ 65, 73, 87.

Cole *v.* Drew, 44 Vt. 49, §§ 53, 54.
—— *v.* Muscatine, 14 Iowa, 296, § 197.
—— *v.* Peoria, 18 Ill. 301, § 234.
—— *v.* West London & Crystal Palace Co., 27 Beav. 242, § 120.
Coleman *v.* Moody, 4 Hen. & M. 1, § 236.
Collins *v.* Creecy, 8 Jones L. 333, § 62.
Colton *v.* Rossi, 9 Cal. 595, § 130.
Columbus *v.* Columbus R. R., 37 Ind. 294, § 320.
—— *v.* Woollen Mills, 33 Ind. 435, §§ 190, 197, 358.
Columbia Bridge Co. *v.* Geisse, 34 N. J. L. 268, § 76; 35 N. J. L. 558, §§ 65, 194, 253; 36 N. J. L. 537, § 253.
Colvill *v.* Langdon, 22 Minn. 565, § 139.
—— *v.* St. Paul R. R., 19 Minn. 283, §§ 163, 165, 173.
Comins *v.* Bradbury, 10 Me. 447, §§ 64, 88.
Commissioners *v.* Harper, 38 Ill. 103, § 344.
—— *v.* Humphrey, 47 Ga. 565, § 87.
—— *v.* Johnston, 71 N. C. 398, § 153.
—— *v.* O'Sullivan, 17 Kan. 58, § 149.
Commissioners' Court *v.* Bowie, 34 Ala. 461, §§ 95, 101, 124, 237, 251, 322.
Commissioners of Central Park, 4 Lans. 467, § 243; 63 Barb. 282, § 46; 51 Barb. 277, §§ 49, 248.
Commissioners of Fisheries *v.* Holyoke Water-Power Co., 104 Mass. 446, § 88.
Commissioners of Highways *v.* Durham, 43 Ill. 86, § 130.
—— *v.* The People, 38 Ill. 347, § 343.
Commissioners of Jersey City (Matter of), 31 N. J. L. 72, § 312.
Commissioners of Leavenworth *v.* Espen, 12 Kan. 531, § 95.
Commissioners of Shawnee County *v.* Beckwith, 10 Kan. 603, §§ 49, 53.
Common Council of Brooklyn, 12 N. Y. Sup. Ct. 175, § 313.
Commonwealth (The) *v.* Alger, 7 Cush. 53 § 7.
—— *v.* Bacon, 13 Ky. 210, § 9.
—— *v.* Beatty, 1 Watts, 382, § 93.
—— *v.* Beeson, 3 Leigh, 821, § 29.
—— *v.* Boston R. R., 3 Cush. 25, §§ 198, 249, 351.
—— *v.* Commissioners of Philadelphia, 2 Whart. 286, § 343.
—— *v.* Coombs, 2 Mass. 489, § 166.
—— *v.* Eastern R. R., 103 Mass. 254, § 43.
—— *v.* Erie R. R., 27 Pa. 339, § 32.
—— *v.* Fisher, 1 Pa. 462, §§ 80, 82, 125.
—— *v.* Great Barrington, 6 Mass. 492, § 330.
—— *v.* Hartford R. R., 14 Gray, 379, § 200.
—— *v.* Haverhill, 7 Allen, 523, § 208.
—— *v.* McAllister, 2 Watts, 190, §§ 125, 246.
—— *v.* Middlesex, 9 Mass. 388, § 151.
—— *v.* Peters, 2 Mass. 125, § 135.
—— *v.* Pittsburgh R. R., 58 Pa. 26, § 168.
—— *v.* Sawin, 2 Pick. 547, § 24.
—— *v.* Stevens, 10 Pick. 247, § 46.
—— *v.* Tewksbury, 11 Metc. 55, § 7.
—— *v.* Westborough, 3 Mass. 406, § 97.
Compton *v.* Susquehanna R. R., 8 Bland, 386, § 124.
Concord (Petition of), 50 N. H. 530, § 318.
Concord R. R. *v.* Greely, 17 N. H. 47, §§ 11, 13, 14, 21, 348; 23 N. H. 237, §§ 79, 170, 175.
Cone *v.* Hartford, 28 Conn. 363, § 55.
Conger *v.* Burlington R. R., 41 Iowa, 419, § 143.
Connecticut *v.* New Haven Co., 43 Conn. 351, § 40.
Connecticut River R. R. *v.* Clapp, 1 Cush. 559, §§ 92, 336.
—— *v.* Holton, 32 Vt. 43, §§ 208, 213.
Connolly *v.* Griswold, 7 Iowa, 416, § 87.
Conter *v.* St. Paul R. R., 22 Minn. 342, § 173.

Convers *v.* Grand Rapids R. R., 18 Mich. 459, §§ 117, 247, 248, 251.
Conwell *v.* Canal Co., 2 Ind. 588, § 87.
Cook *v.* Park Commissioners, 61 Ill. 115, §§ 174, 175.
Cool *v.* Crommet, 13 Me. 250, §§ 65, 74, 103, 285.
Cooling (*Re*), 19 L. J. (Q. B.) 25, § 79.
Cooper *v.* Williams, 5 Ohio, 391, § 23.
Copeland *v.* Packard, 16 Pick. 217, § 97.
Copp *v.* Neal, 7 N. H. 275, § 51.
Corbin *v.* Marsh, 2 Duv. 193, § 3.
Cortelyou *v.* Van Brundt, 2 Johns. 357, § 56.
Cosby *v.* Owensboro R. R., 10 Bush. 288, § 206.
Coster *v.* Albany, 43 N. Y. 399, § 318.
—— *v.* New Jersey R. R., 24 N. J. L. 730, §§ 49, 245, 253.
—— *v.* Tide-Water Co., 18 N. J. Eq. 54, §§ 9, 11.
Cott *v.* Lewiston R. R., 36 N. Y. 214, § 81.
Cotton *v.* Boom Co., 22 Minn. 372, §§ 21, 50, 62.
—— *v.* Pocasset Mfg. Co., 13 Metc. 429, § 291.
Cottrill *v.* Myrick, 12 Me. 222, §§ 22, 111.
County Court of St. Louis County *v.* Griswold, 58 Mo. 175, §§ 11, 12, 18.
Coutant *v.* Catlin, 2 Sandf. Ch. 485, §§ 68, 69.
Covington Street R. R. *v.* Covington, 9 Bush, 127, § 202.
Cowan *v.* Glover, 3 A. K. Marsh. 357, § 98.
Cox *v.* Cummings, 33 Ga. 549, §§ 3, 85.
—— *v.* Louisville R. R., 48 Ind. 178, §§ 51, 180, 204, 206.
Craig *v.* Mayor, 53 Pa. 477, § 50.
—— *v.* Rochester R. R., 39 Barb. 494, § 32.
—— *v.* Rochester City R. W., 39 N. Y. 404, § 205.
Crane *v.* Camp, 12 Conn. 464, §§ 98, 99.
Crangle *v.* Harrisburg, 1 Pa. 182, § 73.
Crawford *v.* Delaware, 7 Ohio St. 459, §§ 196, 206.
—— *v.* Valley R. R., 25 Gratt. 467, § 248.
Crawfordsville R. R. *v.* Wright, 5 Ind. 252, § 210.
Crear *v.* Crossly, 40 Ill. 175, § 26.
Crenshaw *v.* Slate River Co., 6 Rand. 245, §§ 38, 287.
Creswell *v.* Commissioners, 24 Ala. 282, § 269.
Crise *v.* Auditor, 17 Ark. 572, §§ 161, 323.
Crittenden *v.* Wilson, 5 Cow. 165, §§ 60, 89.
Crocket *v.* Boston, 5 Cush. 182, § 24.
Croft *v.* London, etc., Rail. Co., 32 L. J. (Q. B.) 113, §§ 193, 217.
Crosby *v.* Hanover, 36 N. H. 404, §§ 14, 41, 279, 353.
Crossley *v.* O'Brien, 24 Ind. 325, §§ 33, 45, 121, 275.
Crowner *v.* Watertown R. R., 9 How. Pr. 457, § 312.
Cruger *v.* Hudson River R. R., 12 N. Y. 190, §§ 95, 97, 256.
Crystal Palace Rail. Co., 19 Jur. 995, § 175.
Cumberland Valley R. R., *v.* McLanahan, 59 Pa. 23, § 59.
Cuming *v.* Prang, 24 Mich. 514, § 54.
Cummings *v.* Williamsport, 84 Pa. 472, § 159.
Cummins *v.* Shields, 34 Ind. 154, §§ 24, 121.
Cunningham *v.* Campbell, 33 Ga. 625, §§ 3, 85.
—— *v.* Pacific R. R., 61 Mo. 33, § 107.
Cupp *v.* Commissioners, 19 Ohio St. 173, §§ 94, 98.
Curran *v.* Shattuck, 24 Cal. 427, §§ 66, 77, 98.
Currier *v.* Elevated R. R., 6 Blatchf. 487, § 203.
—— *v.* Marietta R. R., 11 Ohio St. 228, § 59.
Curry *v.* Mt. Sterling, 15 Ill. 320, § 143.
Curtis *v.* Eastern R. R., 14 Allen, 55, §§ 183, 190.

Curtis v. Portland, 60 Me. 55, § 311.
—— v. St. Paul R. R., 20 Minn. 28, §§ 162, 168, 165.
Curtiss v. Smith, 35 Conn. 156, §§ 290, 304.
Cushman v. Smith, 34 Me. 247, §§ 30, 126, 129.
Cuthbert v. Kuhn, 3 Whart. 357, § 69.
Cuyler v. Rochester, 12 Wend. 165, § 326.
Cyr v. Dufour, 62 Me. 20, §§ 243, 245.

Daggy v. Green, 12 Ind. 303, § 257.
Dakin v. London & North-Western Rail. Co., 26 L. J. (Ch.) 734, § 120.
Daley v. St. Paul, 7 Minn. 390, §§ 93, 161.
Dalrymple v. Whitinghaus, 26 Vt. 345, § 246.
Dalton v. Northampton, 19 N. H. 362, § 91.
Dalzell v. Davenport, 12 Iowa, 437, §§ 165, 197.
Damour v. Lyons City, 44 Iowa, 276, § 199.
Damrell v. San Joaquin Co., 40 Cal. 154, § 283.
Daniels v. Chicago R. R., 35 Iowa, 129, § 89; 41 Iowa, 52, §§ 89, 174.
Danville R. R. v. The Commonwealth, 73 Pa. 29, § 199.
—— v. Gearhart, 32 Leg. Int. (Pa.) 219, § 162.
Darling v. Blackstone Mfg. Co., 16 Gray, 187, § 295.
Darlington v. United States, 82 Pa. 382, § 347.
Dartmouth College v. Woodward, 4 Wheat. 518, § 38.
Davenport v. Stevenson, 34 Iowa, 225, § 203.
Davidson v. Boston R. R., 3 Cush. 91, §§ 32, 255, 341.
Davis v. Charles River R. R., 11 Cush. 503, §§ 168, 170.
—— v. East Tennessee R. R., 1 Sneed, 94, § 351.
—— v. Lacrosse R. R., 12 Wis. 16, § 90.
Davis v. Mayor of New York, 14 N. Y. 506, §§ 32, 202.
—— v. Russell, 47 Me. 448, § 89.
—— v. San Lorenzo R. R., 47 Cal. 517, §§ 36, 136.
Davvell v. Roper, 24 L. J. (Ch.) 779, § 52.
Day v. Stetson, 8 Me. 365, §§ 14, 91.
Dayton Mining Co. v. Seawell, 11 Nev. 394, § 20.
Dayton R. R. v. Lewton, 20 Ohio St. 401, § 144.
—— v. Marshall, 11 Ohio St. 497, § 311.
Deansville Cemetery Assn. (Matter of), 66 N. Y. 569, § 19.
Dearborn v. Boston R. R., 24 N. H. 179, §§ 166, 218, 220.
Deaton v. Polk Co., 9 Iowa, 594, § 53.
Delaware Canal v. Lee, 22 N. J. L. 243, §§ 220, 222.
Delaware R. R. v. Burson, 61 Pa. 369, §§ 174, 175, 212, 333, 346.
De Long v. Schimmel, 58 Ind. 64, § 116.
Delphi v. Evans, 36 Ind. 90, §§ 54, 195.
Dempsey v. Kipp, 62 Barb. 311, § 26.
Den v. Morris Canal Co., 24 N. J. L. 587, § 142.
Denham v. Bristol, 108 Mass. 202, §§ 24, 27.
Denslow v. New Haven Co., 16 Conn. 98, §§ 88, 128.
Denver R. W. v. Denver City R. W., 2 Col. 673, § 89.
Department of Public Parks, 13 N. Y. Sup. Ct. 486, §§ 203, 225.
Derby v. Framingham R. R., 119 Mass. 516, § 58.
Des Moines v. Layman, 21 Iowa, 153, § 91.
Detmold v. Drake, 46 N. Y. 318, §§ 126, 175, 313.
DeVaraigne v. Fox, 2 Blatchf. 95, § 50.
Dewitt v. Duncan, 46 Cal. 342, § 202.
Dickenson v. Fitchburg, 13 Gray, 546, §§ 168, 169, 170, 173, 252.
Dickey v. Tennison, 27 Mo. 373, §§ 11, 26, 96.
Diedrich v. North-Western R. W., 42 Wis. 248, § 82.

Dietrich *v.* Murdoch, 42 Mo. 279, §§ 11, 141.
Dimmick *v.* Broadhead, 75 Pa. 464, § 136.
Dingley *v.* Boston, 100 Mass. 544, §§ 16, 50.
Directors *v.* Railroad, 7 Watts & S. 236, § 160.
District of Pittsburgh, 2 Watts & S. 320, § 225.
Dobbins *v.* Brown, 12 Pa. St. 75, §§ 87, 66.
Dodge *v.* Commissioners of Essex, 3 Metc. 380, §§ 186, 220.
—— *v.* Burns, 6 Wis. 514, § 329.
Doe d. Clements *v.* Collins, 2 Term Rep. 498, § 120.
—— d. Hudson *v.* Leeds R. R., 20 L. J. (Q. B) 486, § 142.
Donnaher *v.* Mississippi, 8 Smed. & M. 649, § 203.
Doody *v.* Vaughn, 7 Neb. 28, §§ 101, 271.
Doran *v.* Central Pacific R. R., 24 Cal. 245, § 77.
Dore *v.* Milwaukee, 42 Wis. 108, §§ 195, 197.
Dorgan *v.* Boston, 12 Allen, 223, §§ 54, 149, 156, 174.
Dorlan *v.* East Brandywine R. R., 46 Pa. 520, § 173.
Dorrance St., 4 R. I. 230, § 149.
Doughty *v.* Somerville R. R., 7 N. J. Eq. 51, § 125.
Douglass *v.* Turnpike Road, 22 Md. 219, § 84.
Dover St., 18 Johns. 506, § 312.
Drake *v.* Hudson River R. R., 7 Barb. 508, § 203.
Driver *v.* Western R. R., 32 Wis. 569, §§ 167, 174.
Dronberger *v.* Reed, 11 Ind. 420, §§ 91, 126.
Drury *v.* Boston, 101 Mass. 439, § 313.
Dubuque *v.* Benson, 23 Iowa, 248, § 52.
Dudley *v.* Butler, 10 N. H. 281, § 24.
—— *v.* Cilley, 5 N. H. 558, §§ 24, 274.
Duke of Beaufort and Harbor Trustees, 29 L. J. (C. P.) 241, § 330.
Duke of Norfolk *v.* Tennant, 9 Hare, 745; 16 Jur. 398, § 113.
Duncan *v.* Louisville, 8 Bush, 98, §§ 145, 313.
Dunlap *v.* Pulley, 28 Iowa, 469, § 87.
Dunn *v.* Charleston, Harp. 189, § 156.
Dupont *v.* Highway Commissioners., 28 Mich. 362, § 101.
Dussuau *v.* Municipality, 6 La. An. 575, §§ 64, 98.
Dwight *v.* Springfield, 6 Gray, 442, § 258.
—— *v.* Hampden, 11 Cush. 201, §§ 168, 173, 180.
Dyckman *v.* Mayor of New York, 5 N. Y. 434, §§ 107, 262.
Dyer *v.* Wightman, 66 Pa. 425, §§ 68, 69.
—— *v.* Tuskaloosa Bridge Co., 2 Port. 296, § 89.

Eagle *v.* Charing Cross Rail. Co., 36 L. J. (C. P.) 297, § 207.
Eames *v.* Northumberland, 44 N. H. 67, § 318.
—— *v.* New England Worsted Co., 11 Metc. 570, § 298.
East and West India Docks Rail. Co. *v.* Gattke, 3 Mac. & G. 155, § 291.
East Brandywine R. R. *v.* Ranck, 78 Pa. 454, § 172.
East Hartford *v.* Hartford Br. Co., 10 How. 511; 17 Conn. 79, § 38.
East Pennsylvania R. R. *v.* Hiester, 40 Pa. 58, §§ 111, 166, 170.
—— *v.* Hottenstine, 47 Pa. 28, §§ 159, 165.
—— *v.* Schollenberger, 54 Pa. 144, § 30.
East Portland *v.* Multnomah Co., 6 Oreg. 62, § 202.
East Saginaw R. R. *v.* Benham, 28 Mich. 459, §§ 97, 263, 275.
East St. Louis *v.* St. John, 47 Ill. 463, § 48.
East Tennessee R. R. *v.* Love, 3 Head, 63, §§ 71, 72.
Eastern R. R. *v.* Boston R. R., 111 Mass. 125, §§ 42, 45, 178.

Eastern R. R. *v.* Concord R. R., 47 N. H. 103, § 243.
Eastern Counties Rail. Co. *v.* Hawkes, 24 L. J. (Ch.) 601, § 113.
—— *v.* Tufnell, 3 Eng. Rail. Cas. 183, § 385.
Eastman *v.* Stowe, 37 Me. 86, § 92.
Easton *v.* Amoskeag Co., 44 N. H. 143, §§ 128, 293.
Eaton *v.* Boston & Maine R. R., 51 N. H. 504, §§ 31, 182, 184, 188, 217, 222.
—— *v.* Framingham, 6 Cush. 245, § 233.
Eberhart *v.* Chicago R. R., 70 Ill. 347, §§ 159, 165.
Eddings *v.* Seabrook, 12 Rich. L. 504, §§ 162, 173.
Edgecumbe *v.* Burlington, 46 Vt. 218, § 19.
Edgerton *v.* Huff, 26 Ind. 35, § 50.
Edgwood Co.'s Appeal, 79 Pa. 257, § 28.
Edmands *v.* Boston, 108 Mass. 535, §§ 65, 68, 166, 170, 171, 176, 191.
Edmondson (*In re*), 17 Q. B. 67, § 333.
Edwards *v.* Stonington Cemetery Assn., 20 Conn. 466, § 19.
Eidemiller *v.* Wyandotte City, 2 Dill. 376, §§ 86, 137, 138.
Elder *v.* Bemis, 2 Metc. 599, §§ 87, 197.
Eldridge *v.* Smith, 34 Vt. 484, § 59.
Elgin *v.* Eaton, 83 Ill. 535, §§ 151, 197.
Elizabethtown R. R. *v.* Helm, 8 Bush, 681, §§ 135, 149, 151, 158, 159.
—— *v.* Combs, 10 Bush, 382, §§ 198, 206, 207.
Ellicottville Road *v.* Buffalo R. R., 20 Barb. 644, § 82.
Ells *v.* Pacific R. R., 51 Mo. 200, § 107.
Elliott *v.* Fair Haven R. R., 32 Conn. 579, § 205.
Elting Woollen Co. *v.* Williams, 36 Conn. 310, § 290, 310.
Embury *v.* Conner, 3 N. Y. 511, §§ 22, 23, 329.
Emerson *v.* Reading, 14 Vt. 279, § 286.
—— *v.* Western R. R., 75 Ill. 176, § 148.
Emery *v.* San Francisco Gas Co., 28 Cal. 345, § 2.
Endicott, petitioner, 24 Pick. 339, § 148.
Enfield Br. Co. *v.* Hartford Br., 17 Conn. 454, §§ 42, 43.
—— *v.* Hartford R. R., 17 Conn. 40, §§ 37, 42, 43, 45, 133.
English *v.* New Haven Co., 32 Conn. 240, § 43.
Eppes *v.* Cralle, 1 Munf. 258, §§ 303, 338.
Erie R. R. *v.* Casey, 26 Pa. 287, § 8.
Erskine *v.* Boston, 14 Gray, 216, § 340.
Estabrooks *v.* Petersborough R. R., 12 Cush. 224, § 81.
Eubank *v.* Pence, 5 Litt. 338, § 289.
Evans *v.* Haefner, 29 Mo. 141, §§ 52, 147, 216, 328.
—— *v.* James, 4 Wis. 403, § 286.
—— *v.* Missouri R. R., 64 Mo. 453, §§ 137, 140.
Evansville R. R. *v.* Cochran, 10 Ind. 560, § 254.
—— *v.* Dick, 9 Ind. 433, § 187.
—— *v.* Fitzpatrick, 10 Ind. 120, §§ 165, 212.
—— *v.* Grady, 6 Bush, 144, § 141.
—— *v.* Miller, 30 Ind. 209, §§ 91, 334.
Ewing *v.* St. Louis, 5 Wall. 413, §§ 90, 323.
Eward *v.* Lawrenceburgh R. R., 7 Ind. 711, § 89.
Fairbanks *v.* Fitchburg R. R., 110 Mass. 224, § 173.
Fall River Works *v.* Fall River, 110 Mass. 428, §§ 168, 281.
Fall River Iron-Works *v.* Old Colony R. R., 5 Allen, 221, § 62.
Falls *v.* Belfast & Ballymena Rail. Co., 12 Irish L. R. 233, § 79.
Farlow, *ex parte*, 2 Barn. & Adol. 341, § 68.
Farmer *v.* Hooksett, 28 N. H. 244, § 312.
—— *v.* Pauley, 50 Ind. 583, § 278.
—— *v.* Stewart, 2 N. H. 97, § 242.
Farmers' Turnpike Co., 10 Johns. 388, § 115.
Farnsworth *v.* Boston, 121 Mass. 173, §§ 49, 311.
Farwell *v.* Cambridge, 11 Gray, 413, § 152.

Farrand *v.* Chicago R. R., 21 Wis. 435, § 165.
Fay *v.* Salem Co., 111 Mass. 27, § 83.
Fearing *v.* Irwin, 55 N. Y. 486, § 318.
Fehr *v.* Schuylkill Nav. Co., 69 Pa. 161, §§ 291, 297.
Felch *v.* Gilman, 22 Vt. 38, §§ 54, 141, 184, 285, 329.
Fellow *v.* Fulgham, 8 Murph. 254, § 307.
Fellowes *v.* New Haven, 44 Conn. 240, § 195.
Fenelon's Petition, 7 Pa. 173, § 93.
Fernald *v.* Boston, 12 Cush. 574, § 197.
Ferguson *v.* London Rail. Co., 32 L. J. (Ch.) 29, § 120.
Ferree *v.* School District, 76 Pa. 376, § 49.
Ferrand *v.* Corporation of Bradford, 21 Beav. 412, § 81.
Ferris *v.* Bramble, 5 Ohio St. 109, § 186.
—— *v.* Ward, 9 Ill. 499, §§ 143, 147.
Field *v.* Des Moines, 39 Iowa, 575, § 4.
—— *v.* Vermont R. R., 4 Cush. 150, § 327.
Finney *v.* Somerville, 80 Pa. 59, § 21.
First Church *v.* Boston, 14 Gray, 214, § 166.
First National Bank *v.* West River R. R., 29 Vt. 167, § 312.
First Parish *v.* Middlesex, 7 Gray, 106, §§ 173, 193.
—— *v.* Plymouth, 8 Cush. 475, § 212.
Fish *v.* Rochester, 6 Paige, 268, § 54.
Fisher *v.* Hobbs, 42 Ind. 276, § 328.
—— *v.* Horicon Co., 10 Wis. 351, § 15.
—— *v.* New York, 57 N. Y. 344, § 76.
—— *v.* Rochester, 6 Lans. 225, § 52.
—— *v.* Smith, 5 Leigh, 611, § 228.
Fiske *v.* Chesterfield, 14 N. H. 240, §§ 172, 175.
—— *v.* Framingham Mfg. Co., 12 Pick. 68, §§ 297, 302.
Fitch *v.* Stevens, 4 Metc. 426, § 304.
Fitchburg R. R. *v.* Boston R. R., 3 Cush. 58, §§ 78, 247, 257, 333.
—— *v.* Eastern R. R., 6 Allen, 98, § 259.
Fitchburg R. R. *v.* Grand Junction R. R., 4 Allen, 198, § 43.
Fitzwater Road, 4 Serg. & R. 106, § 270.
Flagg *v.* Worcester, 13 Gray, 601, §§ 87, 189, 340; 8 Cush. 69, §§ 249, 326.
Flanders *v.* Colebrook, 51 N. H. 300, § 280.
Flatbush Avenue (In matter of), 1 Barb. 286, § 77.
Fleming *v.* Chicago R. R., 34 Iowa, 353, §§ 167, 173, 220.
Fletcher *v.* Auburn R. R., 25 Wend. 462, §§ 134, 206.
—— *v.* Fugate, 8 J. J. Marsh. 631, § 275.
—— *v.* Great Western Rail. Co., 29 L. J. (Exch.) 253, § 52.
—— *v.* Peck, 6 Cranch, 87, §§ 37, 348.
Floyd *v.* Turner, 23 Texas, 292, § 90.
Foot *v.* Stiles, 57 N. Y. 399, § 86.
Foote *v.* Cincinnati, 11 Ohio, 408, §§ 68, 69.
Ford *v.* Chicago R. R., 14 Wis. 609, § 204.
—— *v.* Commissioners, 64 Me. 408, § 223.
—— *v.* Danbury, 44 N. H. 388, § 284.
Forney *v.* Ralls, 30 Iowa, 559, § 306.
Forster *v.* Cumberland Valley R. R., 23 Pa. 371, § 346.
Foster *v.* Boston, 22 Pick. 33, § 111.
Forward *v.* Hampshire Canal Co., 22 Pick. 462, § 144.
Fourth Avenue, 11 Abb. Pr. 189, § 280.
Fowle *v.* Northampton Co., 112 Mass. 334, § 220.
Fowler (*In re*), 53 N. Y. 60, § 322.
—— *v.* Holbrook, 17 Pick. 188, § 310.
—— *v.* Middlesex, 6 Allen, 92, §§ 169, 170, 251.
Franklin *v.* Fisk, 13 Allen, 211, § 189.
Frederick *v.* Shane, 32 Iowa, 254, § 149.
Freedle *v.* North Carolina R. R., 4 Jones L. 89, §§ 1, 152, 153.
Freeland *v.* Pennsylvania R. R., 66 Pa. 91, § 63.

Freetown v. Bristol, 9 Pick. 46, § 99.
French v. Braintree Mfg. Co., 28 Pick. 216, §§ 290, 304.
—— v. White, 24 Conn. 170, § 354.
Frevert v. Frifrock, 32 Ohio St. 621, § 323.
Friend, appellant, 53 Me. 387, § 227.
Fries v. Southern Pennsylvania R. R. & Mining Co., 85 Pa. 73, § 144.
Frith v. Dubuque, 45 Iowa, 406, § 203.
—— v. Justices, 30 Ga. 723, § 228.
Frost v. Earnest, 4 Whart. 86, §§ 87, 65, 68.
Fuller v. Chicopee Mfg. Co., 16 Gray, 43, §§ 296, 298.
—— v. Edings, 11 Rich. 289, §§ 39, 87, 167.
—— v. French, 10 Metc. 359, §§ 299, 306.
—— v. Plymouth, 15 Pick. 81, § 111.
Furman St. (Matter of), 17 Wend. 649, §§ 173, 195, 225.
Furniss v. Hudson River R. R., 5 Sandf. 551, § 216.

Galen v. Plank-road Co., 27 Barb. 543, § 276.
Galena R. R. v. Pound, 22 Ill. 399, § 323.
Galgay v. Great Southern Rail. Co., 4 Irish C. L. R. 456, § 81.
Gammell v. Potter, 6 Iowa, 548, § 288.
Gardiner v. Boston R. R., 9 Cush. 1, § 60.
Gardner v. Newburgh, 2 Johns. Ch. 162, §§ 1, 18, 30, 81.
Garrett v. St. Louis, 25 Mo. 505, § 149.
Garrison v. New York, 21 Wall. 196, §§ 84, 93, 124, 322.
Gay v. Gardiner, 54 Me. 477, § 175.
Gear v. C. C. & D. R. R., 43 Iowa, 83, §§ 199, 220.
—— v. Dubuque R. R., 20 Iowa, 523, §§ 312, 313.
—— v. Railroad, 39 Iowa, 28, §§ 31, 32, 159.
Gedney v. Tewksbury, 3 Mass. 307, § 87.
George's Creek Co. v. Coal Co., 40 Md. 425, § 94.
Gherkey v. Haines, 4 Blackf. 159, § 289.
Gibson v. Hammersmith Rail. Co., 32 L. J. (Ch.) 337; 2 Drew. & Sm. 603, § 121.
Gidney v. Earl, 12 Wend. 98, §§ 51, 56.
Giesy v. Cincinnati R. R., 4 Ohio St. 308, §§ 11, 59, 86, 261.
Gilbert v. Turnpike Co., 3 Johns. Cas. 107, § 99, 107.
Gile v. Stevens, 13 Gray, 146, §§ 291, 296.
Giles v. London, Chatham & Dover Rail. Co., 30 L. J. (Ch.) 603, § 121.
Gilkerson v. Scott, 76 Ill. 509, § 255, 359.
Gillan v. Hutchinson, 16 Cal. 153, § 180.
Gillespie v. Thomas, 15 Wend. 464, §§ 68, 69.
Gillet v. Jones, 1 Dev. & B. 339, § 291.
Gilliam v. Canaday, 11 Ired. 106, §§ 291, 299.
Gilligan v. Providence, 11 R. I. 258, § 68.
Gilman v. Sheboygan, 2 Black, 510, § 2.
—— v. Sheboygan R. R., 40 Wis. 653, § 144.
Glimer v. Lime Point, 18 Cal. 229, §§ 12, 347.
—— v. Lime Point, 19 Cal. 47, § 105.
Gimble v. Stolte, Admrx., 6 Cent. L. J. 358, § 74.
Glennon v. Milwaukee R. R., 79 Ill. 501, § 177.
Gloucester v. Essex, 8 Metc. 375, § 282.
Glover v. North Staffordshire Rail. Co., 20 L. J. (Q. B.) 376, § 31; 16 Q. B. 912, § 207.
—— v. Powell, 10 N. J. Eq. 211, §§ 30, 45, 81.
Goddard v. Boston, 20 Pick. 407, § 340.
—— v. Worcester, 9 Gray, 88, § 330.
Gold v. Vermont Central R. R., 19 Vt. 478, § 91.
Goldman v. Justices, 3 Head, 107, § 269.

Goodbody *v.* Midland Rail. Co., Irish Res. Cas. 20, § 182.
Goodin *v.* Canal Co., 18 Ohio, 169, § 141.
Goodwin *v.* Commissioners, 60 Me. 328, § 272.
—— *v.* Milton, 25 N. H. 458, §§ 67, 228, 237.
—— *v.* Wethersfield, 43 Conn. 437, §§ 229, 235, 279.
Gordon *v.* Pennsylvania R. R., 6 Rep. 727 (Pa.), § 32.
Gosling, *ex parte*, 4 Barn. & Adol. 596, § 68.
Goszler *v.* Georgetown, 6 Wheat. 593, § 195.
Gould *v.* Booth, 66 N. Y. 62, § 189.
—— *v.* Glass, 19 Barb. 179, § 125.
—— *v.* Hudson River R. R., 6 N. Y. 522, § 82.
Governors of St. Thomas Hospital *v.* Charing Cross Rail. Co., 30 L. J. (Ch.) 895, § 120.
Graff *v.* Mayor of Baltimore, 10 Md. 544, §§ 311, 312.
Graham *v.* Connersville R. R., 36 Ind. 468, § 148.
—— *v.* Columbus R. R., 27 Ind. 260, § 130.
Grand Junction R. R. *v.* Middlesex, 14 Gray, 553, §§ 41, 160, 233.
Grand Rapids Co. *v.* Jarvis, 30 Mich. 308, §§ 30, 48.
Grand Rapids R. R. *v.* Heisel, — Mich. —, §§ 203, 204, 205.
—— *v.* Horn, 41 Ind. 479, §§ 149, 166, 189.
—— *v.* Van Driele, 24 Mich. 409, § 275.
Granger *v.* Syracuse, 38 How. Pr. 308, § 330.
Grant *v.* Courter, 24 Barb. 232, § 2.
Gray *v.* Burlington R. R., 37 Iowa, 119, § 113, 213.
—— *v.* Iowa Land Co., 26 Iowa, 387, § 202.
—— *v.* St. Paul R. R., 13 Minn. 315, §§ 128, 204.
Green *v.* Reading, 9 Watts, 382, § 195.
—— *v.* Fall River, 113 Mass. 262, § 170.
Green *v.* Swift, 47 Cal. 536, § 7.
Greenville R. R. *v.* Nunnamaker, 4 Rich. L. 107, §§ 218, 246.
—— *v.* Partlow, 5 Rich. 428, §§ 170, 212.
Greenwood *v.* Wilton R. R., 23 N. H. 261, § 81.
Griffin *v.* Dogan, 48 Miss. 11, § 2.
—— *v.* Martin, 7 Barb. 297, § 53.
Grigsby *v.* Burtnett, 31 Cal. 406, § 126.
Griscom *v.* Gilmore, 16 N. J. L. 105, § 230.
Griswold *v.* Bay City, 34 Mich. 452, § 54.
Groce *v.* Zumwalt, 4 Mo. 567, § 305.
Grosvenor *v.* Hampstead Junction Rail. Co., 26 L. J. (Ch.) 731, § 120; 1 De G. & J. 446, § 120.
Groton *v.* Hulburt, 22 Conn. 178, § 227.
Guillotte *v.* New Orleans, 12 La. An. 432, § 8.
Gurnsey *v.* Edwards, 26 N. H. 224, § 24.
Gwynne *v.* Cincinnati, 3 Ohio, 24, § 71.

Hagar *v.* Brainard, 44 Vt. 294, §§ 65, 68, 74, 76.
Haight *v.* Keokuk, 4 Iowa, 199, § 35.
Haldeman *v.* Pennsylvania R. R., 50 Pa. 425, §§ 50, 111.
Hale *v.* Lawrence, 23 N. J. L. 590, § 4.
Hall *v.* Pickering, 40 Me. 548, §§ 114, 129.
—— *v.* The People, 57 Ill. 307, §§ 105, 230.
Hallock *v.* Franklin, 2 Metc. 558, § 319.
—— *v.* Woolsey, 23 Wend. 328, § 280.
Ham *v.* Salem, 100 Mass. 350, §§ 110, 168, 170.
Hamersley *v.* New York, 56 N. Y. 533, §§ 126, 175, 313.
Hamilton Avenue, 14 Barb. 405, § 39.
Hamilton *v.* Annapolis R. R., 1 Md. Ch. 107, §§ 1, 135, 175, 320, 323; 1 Md. 553, §§ 57, 58, 59.
Hammett *v.* Philadelphia, 65 Pa. 146, § 2.
Hampton *v.* Coffin, 4 N. H. 517, §§ 51, 278.

Hampton v. The Commonwealth, 19 Pa. 329, § 93.
Hancock v. Boston, 1 Metc. 122, § 97.
Hand Gold Mining Co. v. Parker, Sup. Ct. Ga., § 20.
Hannibal v. Hannibal R. R., 49 Mo. 480, § 45.
Hannibal Bridge v. Schaubacher, 57 Mo. 582, § 167; 49 Mo. 555, § 282.
Hannibal R. R. v. Rowland, 29 Mo. 337, § 241.
—— v. Morton, 27 Mo. 317, §§ 159, 288, 289; 20 Mo. 70, § 322.
—— v. Muder, 49 Mo. 165, §§ 59, 107.
Hannum v. Westchester, 68 Pa. 475, § 346.
Hanson v. Lafayette, 18 La. 295, §§ 125, 322.
Harbeck v. Toledo, 11 Ohio St. 219, §§ 100, 104.
Hardenburgh v. Lockwood, 25 Barb. 9, § 53.
Harding v. Funk, 8 Kan. 315, §§ 15, 298.
—— v. Goodlett, 3 Yerg. 41, § 15, 287.
—— v. Medway, 10 Metc. 465, § 319.
Harness v. Chesapeake Canal Co., 1 Md. Ch. 248, §§ 1, 185, 175.
Harper v. Richardson, 22 Cal. 251, §§ 340, 344.
—— v. Lexington R. R., 2 Dana, 227, §§ 94, 254.
Harrington v. Berkshire, 22 Pick. 263, § 319.
—— v. Harrington, 1 Metc. 404, § 24.
—— v. St. Paul R. R., 17 Minn. 215, §§ 89, 90, 142, 200, 204.
Harris v. Elliott, 10 Pet. 25, § 51.
—— v. Thompson, 9 Barb. 350, § 11.
Harrisburg v. Crangle, 3 Watts & S. 460, §§ 49, 65, 128, 136.
Harrisburg R. R. v. Moore, — Pa. —, § 153.
—— v. Peffer, 84 Pa. 295, § 87.
Harrison v. Courtwright, — Pa. ——, § 128.
—— v. Iowa R. R., 36 Iowa, 323, §§ 159, 165, 338.
—— v. Young, 9 Ga. 359, §§ 92, 173.
Hart v. Kucher, 5 Serg. & R. 1, § 9.
Hartshorn v. Worcester, 118 Mass 111, § 198.
Hartwell v. Armstrong, 19 Barb. 166, § 16.
Hartz v. St. Paul R. R., 21 Minn. 358, § 90.
Harvard R. R. v. Rand, 8 Cush. 218, § 338.
Harvey v. Lackawanna R. R., 47 Pa. 428, §§ 152, 246.
—— v. Lloyd, 3 Pa. 331, § 28.
—— v. Thomas, 10 Watts, 63, § 28.
Harwinton v. Catlin, 19 Conn. 520, § 322.
Haskell v. Bristol, 9 Gray, 341, § 326.
—— v. New Bedford, 103 Mass. 208, §§ 66, 190, 358.
Haslam v. Galena R. R., 64 Ill. 353, § 173.
Hasson v. Oil Creek R. R., 8 Phila. 556, § 210.
Hastings v. B. & M. R. R., 38 Iowa, 316, §§ 317, 320.
Haswell v. Vermont Central R. R., 28 Vt. 228, § 76.
Hatch v. Arnault, 3 La. An. 482, § 51.
—— v. Cincinnati R. R., 18 Ohio St. 92, §§ 32, 46, 163.
—— v. Vermont Central R. R., 25 Vt. 49, §§ 81, 183, 220.
Hatermehl v. Dickson, 8 Phila. 282, § 126.
Haverhill Bridge v. County Commissioners, 103 Mass. 120, §§ 11, 175.
Hawkins v. County Commissioners, 2 Allen, 254, § 77.
—— v. Robinson, 5 J. J. Marsh. 9, § 335.
—— v. Rochester, 1 Wend. 53, § 312.
Hawley v. North Staffordshire Rail. Co., 2 De G. & Sm. 33, § 237.
Hay v. Cohoes Co., 3 Barb. 42, § 15.
Hayes v. Ottawa R. R., 54 Ill. 373, §§ 149, 155, 158.
—— v. Shackford, 3 N. H. 10, § 238.
Haynes v. Thomas, 7 Ind. 38, § 203.
Hays v. Briggs, 74 Pa. 373, § 28.
—— v. Campbell, 17 Ind. 430, § 270.

Hays v. Parrish, 52 Ind. 182, §§ 280, 270.
—— v. Risher, 32 Pa. 169, §§ 24, 28, 125.
—— v. The State, 8 Ind. 425, § 278.
Hazen v. Boston R. R., 2 Gray, 574, §§ 86, 116, 122, 341.
—— v. Essex Co., 12 Cush. 475, §§ 15, 84.
Heady v. Vevay Turnpike, 52 Ind. 117, § 254.
Healey v. Newton, 119 Mass. 480, § 104.
Heard v. Brooklyn, 60 N. Y. 242, § 57.
—— v. Middlesex Canal, 5 Metc. 81, §§ 87, 217, 310.
Heath v. Barman, 49 Barb. 496, § 84.
Hedrick v. Hedrick, 55 Ind. 78, §§ 77, 115.
Hegar v. Chicago R. R., 26 Wis. 624, § 207.
Helm v. Short, 7 Bush, 623, §§ 275, 338.
Hendershott v. Ottumwa, 46 Iowa, 58, §§ 184, 195.
Henderson v. Adams, 5 Cush. 610, § 291.
Henderson R. R. v. Dickerson, 17 B. Mon. 173, §§ 149, 158, 166.
Hendricks v. Johnson, 6 Port. 472, § 290.
Henline v. The People, 81 Ill. 269, §§ 252, 277, 323.
Henniker v. Contoocook R. R., 29 N. H. 146, § 87.
Henry v. Dubuque R. R., 2 Iowa, 288, §§ 49, 135, 159, 212; 10 Iowa, 540, § 130.
—— v. Pittsburgh Bridge, 8 Watts & S. 85, § 207.
—— v. Thomas, 119 Mass. 583, §§ 16, 356.
—— v. Vermont Central R. R., 30 Vt. 638, § 81.
Hentz v. Long Island R. R., 13 Barb. 646, §§ 62, 66, 141.
Hepburn's Case, 3 Bland, 95, § 22.
Herbein v. Railroad, 9 Watts, 272, § 335.
Herrick v. Moore, 19 Me. 313, § 273.
Hessler v. Drainage Commissioners, 53 Ill. 105, § 85
Hetfield v. Central R. R., 29 N. J. L. 571, § 111.
Heyneman v. Blake, 19 Cal. 579, §§ 49, 85, 91.
Heyward v. Mayor of New York, 7 N. Y. 314, §§ 1, 50, 92.
Hibbs v. Chicago R. R., 39 Iowa, 340, §§ 143, 144, 148.
Hickerson v. Mexico, 58 Mo. 61, § 90.
Hickok v. Hine, 23 Ohio St. 523, §§ 46, 79.
Hicks v. Foster, 32 Ga. 414, § 256.
Hidden v. Davisson, 51 Cal. 138, § 75.
Higbee v. Camden R. R., 19 N. J. Eq. 276, §§ 32, 51, 200.
Higgins v. Chicago, 18 Ill. 276, § 145.
—— v. Reynolds, 31 N. Y. 151, § 54.
Higginson v. Nahant, 11 Allen, 530, §§ 18, 27.
High v. Ditching Assn., 44 Ind. 356, § 227.
Hilcoat v. Archbishop of Canterbury and York, 19 L. J. (C. P.) 376, § 173.
Hildreth v. Lowell, 11 Gray, 345, §§ 16, 93, 330, 354.
Hill v. Baker, 28 Me. 9, §§ 235, 305.
—— v. Bridges, 6 Port. 197, § 322.
—— v. Mohawk R. R., 5 Denio, 203, § 112; 7 N. Y. 152, § 112.
—— Sayles, 12 Metc. 142, § 297.
Hinchman v. Paterson H. R. R., 17 N. J. Eq. 75, §§ 204, 205.
Hinckley, petitioner, 15 Pick. 447, §§ 109, 264.
Hine v. Keokuk R. R., 42 Iowa, 636, § 203.
Hingham Bridge Co. v. Norfolk, 6 Allen, 353, §§ 11, 50, 268.
Hitchcock v. Danbury R. R., 25 Conn. 516, § 329.
Hoadley v. Waterbury, 34 Conn. 33, § 24.
Hoag v. Switzer, 61 Ill. 294, § 212.
Hoagland v. Culvert, 20 N. J. L. 387, §§ 101, 228.
Hobart v. Ford, 6 Nev. 77, § 351.
Hodgkinson v. Long Island R. R., 13, Barb. 646, § 141.

Holbert v. St. Louis R. R., 45 Iowa, 23, §§ 61, 144, 352.
Holcomb v. Moore. 4 Allen, 529, § 36.
Holcraft v. King, 25 Ind. 352, § 202.
Holdane v. Trustees, 28 Barb. 103, § 279.
Holden v. Cole, 1 Pa. 303, § 36.
Hollister v. Union Co., 9 Conn. 436, § 80.
Holton v. Butler, 22 Iowa, 557, § 212.
—— v. Milwaukee, 31 Wis. 27, §§ 80, 149.
Holyoke Co. v. Lyman, 15 Wall. 500, §§ 15, 38, 239.
Homochitto River v. Withers, 29 Miss. 21, § 80.
Honenstine v. Vaughan, 7 Blackf. 520, §§ 296, 305.
Hood v. Finch, 8 Wis. 381, §§ 94, 146.
Hook v. Smith, 6 Mo. 225, §§ 290, 295.
Hooker v. Martin, 17 N. Y. Sup. Ct. 302, § 74.
—— v. New Haven Co., 14 Conn. 146, § 30.
—— v. Utica Turnpike, 12 Wend. 371, § 57.
Hooksett v. Amoskeag Co., 44 N. H. 105, § 293.
Hooper v. Bridgewater, 102 Mass. 512, § 332.
Hopkinton v. Winship, 35 N. H. 209, § 22.
Hord v. Nashville R. R., 2 Swan, 497, § 91.
Hornback v. Cincinnati R. R., 20 Ohio St. 81, § 113.
Hornstein v. Atlantic R. R., 51 Pa. 87, § 152.
Horrocks v. Metropolitan Rail. Co., 4 B. & S. 315, § 160.
Horton v. Grand Haven, 24 Mich. 465, § 275.
Hortsman v. Lexington R. R., 18 B. Mon. 218, § 185.
Hosher v. Kansas City R. R., 60 Mo. 329, §§ 114, 152, 165, 174, 189.
Hosmer v. Warner, 15 Gray, 46, § 294.
Hotchkiss v. Auburn R. R., 36 Barb. 600, §§ 67, 72.
Hougan v. Milwaukee R. R., 35 Iowa, 558, § 185.
Housatonic R. R. v. Lee, etc., R. R., 118 Mass. 391, §§ 46, 115.
Houston R. R. v. Milburn, 34 Texas, 224, §§ 91, 246.
Hovey v. Mayo, 43 Me. 322, §§ 87, 197.
Howard v. Providence, 6 R. I. 514, §§ 168, 169.
Howcott's Executor v. Coffield's Executor, 7 Ired. 24, § 307.
—— v. Warren, 7 Ired. 20, § 67.
Howland v. Commissioners, 49 Me. 143, § 330.
Hubbard v. Webster, 118 Mass. 599, § 197.
—— v. Wickliffe, 2 A. K. Marsh. 503, § 235.
Hudson Canal Co. v. New York R. R., 9 Paige, 323, § 58.
Hudson River R. R. v. Outwater, 3 Sandf. 689, §§ 312, 313.
Hueston v. Eaton R. R., 4 Ohio St. 685, § 147.
Hughes v. Sellers, 34 Ind. 337, § 77.
Humes v. Mayor, 1 Humph. 403, § 195.
Hunt v. Armbruster, 17 N. J. Eq. 203, § 9.
—— v. Smith, 9 Kan. 137, §§ 98, 118.
Hunter v. Jones. 13 Minn. 307, § 212.
—— v. Matthews, 12 Leigh, 228, § 252; 1 Rob. (Va.) 453, § 301.
—— v. Newport. 5 R. I. 325, §§ 24, 274, 275, 279.
Hunting v. Curtis, 10 Iowa, 152, §§ 292, 309.
Hupert v. Anderson, 35 Iowa, 579, § 312.
Hursh v. St. Paul R. R., 17 Minn. 439, §§ 90, 166, 316.
Hutton v. London & South-Western Rail. Co., 18 L. J. (Ch.) 345, § 194.
Huyett v. Philadelphia R. R., 23 Pa. 373, § 220.
Hyde v. Mayor of Manchester, 5 De G. & Sm. 249, § 143.
—— v. Middlesex, 2 Gray, 267, § 276.
Hymes v. Aydelott, 26 Ind. 431, § 91.

Illinois Canal v. Chicago R. R., 14 Ill. 314, §§ 39, 40, 41, 45.
Illinois Central R. R. v. Bloomington, 76 Ill. 447, §§ 43, 214.
Illinois R. R. v. McClintock, 68 Ill. 296, § 175.
—— v. Von Horn, 18 Ill. 257, §§ 16a, 168.
Imlay v. Union Branch R. R., 26 Conn. 249, § 82.
Indiana R. R. v. Hunter, 8 Ind. 74, § 174.
—— v. Oakes, 20 Ind. 9, §§ 87, 108, 345.
—— v. The State, 8 Ind. 421, § 351.
Indianapolis R. R. v. Brower, 12 Ind. 374, § 139.
—— v. Hartley, 67 Ill. 439, §§ 193, 207.
—— v. McAhren, 12 Ind. 552, § 204.
—— v. Newsom, 54 Ind. 121, § 115.
—— v. Smythe, 45 Ind. 822, § 334.
—— v. The State, 37 Ind. 489, §§ 199, 202.
Ingo v. Police Jury, 14 La. An. 117, § 234.
Ingraham v. Chicago R. R., 34 Iowa, 249, §§ 82, 203.
Ingram v. C. D. & M. R. R., 38 Iowa, 669, § 203.
Inhabitants of N. Reading v. County Commissioners, 7 Gray, 102, § 330.
Inhabitants of W. Newbury v. Chase, 5 Gray, 421, §§ 168, 323.
Inhabitants of Wayland v. Middlesex, 4 Gray, 500, §§ 12, 18.
Ipswich v. Essex, 10 Pick. 519, § 227.
Irish v. Burlington R. R., 44 Iowa, 380, § 131.
Iron R. R. Co. v. Ironton, 19 Ohio St. 299, § 41.
Isom v. Mississippi R. R., 36 Miss. 300, §§ 91, 135, 151, 153.

Jackson v. Hathaway, 15 Johns. 447, §§ 51, 52, 53, 54.
—— v. Jackson, 16 Ohio St. 163, § 318.
—— v. Portland, 63 Me. 55, § 220.
—— v. Rutland R. R., 25 Vt. 150, § 208.
Jacob v. Louisville, 9 Dana, 114, §§ 149, 158.
Jacksonville R. R. v. Kidder, 21 Ill. 131, §§ 180, 219.
James River Co. v. Anderson, 12 Leigh, 278, § 90.
—— v. Thompson, 8 Gratt. 270, § 42.
—— v. Turner, 9 Leigh, 313, §§ 149, 152, 153, 162.
Jamieson v. Commissioners of Cass County, 56 Ind. 466, § 338.
Jamison v. Springfield, 53 Mo. 224, §§ 88, 107, 207.
Jefferson County v. Cowan, 54 Mo. 234, § 271.
Jeffersonville R. R. v. Daugherty, 40 Ind. 33, §§ 41, 126.
—— v. Esterle, 13 Ky. 667, §§ 90, 193.
Jerome v. Ross, 7 Johns. Ch. 315, §§ 49, 84, 123.
Jersey City & B. R. R. v. Jersey City & H. R. R., 20 N. J. Eq. 61, §§ 44, 205.
Jeter v. Board, 27 Gratt. 910, § 324.
Jewett v. Israel, 35 Iowa, 231, § 321.
John and Cherry Streets, 19 Wend. 659, §§ 11, 51, 74.
Johns v. Marion County, 4 Oreg. 46, §§ 270, 323.
Joliet R. R. v. Barrows, 24 Ill. 562, § 95.
Johnson v. Alameda County, 14 Cal. 106, § 130.
—— v. Joliet R. R., 23 Ill. 202, §§ 91, 98, 147.
—— v. Kittredge, 17 Mass. 76, § 297.
—— v. United States, 4 Ct. of Cl. 248, § 3; 8 Ct. of Cl. 243, § 37.
Johnston v. Rankin, 70 N. C. 550, §§ 124, 249, 323, 333.
—— v. Roane, 3 Jones L. 523, § 295.
—— v. Supervisors, 19 Johns. 272, § 145.
Jones v. Barclay, 2 J. J. Marsh. 73, §§ 72, 101, 160.
—— v. Chicago R. R., 68 Ill. 380, §§ 163, 167, 170, 212.
—— v. Festiniog Rail. Co., L. R. 3 Q. B. 733, §§ 220, 221.
—— v. Goffstown, 39 N. H. 254, § 237.

Jones *v.* Oxford County, 45 Me. 419, § 312.
—— *v.* Phillips, 30 Me. 455, § 295.
—— *v.* Walker, 2 Paine C. Ct. 688, § 37.
—— *v.* Wills Valley R. R., 30 Ga. 43, § 158.
Jordan *v.* Hyatt, 8 Barb. 275, § 92.
—— *v.* Haskell, 63 Me. 189, 193, §§ 57, 324.
—— *v.* Woodward, 40 Me. 317, §§ 15, 287, 301.
Jubb *v.* Hull Dock Co., 9 Q. B. 443, § 177.
Judson *v.* Bridgeport, 25 Conn. 426, § 227.
Justice *v.* Nesquehoning Valley R. R., 18 Alb. L. J. 171 (Pa.), § 148.
Justices *v.* Jefferson, 1 Coldw. 419, § 145.

Kaiser *v.* St. Paul R. R., 22 Minn. 149, § 204.
Kamer *v.* Clatsop County, 6 Oreg. 238, §§ 271, 272.
Kane *v.* Baltimore, 15 Md. 240, §§ 18, 56, 79.
Kankakee R. R. *v.* Chester, 62 Ill. 235, § 327.
Kansas City *v.* Kansas Pacific R. W., 18 Kan. 331, § 137.
Kansas City R. R. *v.* Campbell, 62 Mo. 585, §§ 107, 244.
Kansas Pacific R. R. *v.* Hopkins, 18 Kan. 494, § 113.
—— *v.* Streeter, 8 Kan. 133, § 89.
Karber *v.* Nellis, 22 Wis. 215, § 329.
Keasy *v.* Louisville, 4 Dana, 154, § 207.
Keenan. *ex parte*, 21 Ala. 558, § 333.
Keene *v.* Bristol, 25 Pa. 46, § 126.
—— *v.* Chapman, 25 Me. 126, § 64.
Keithsburg R. R. *v.* Henry, 79 Ill. 290, §§ 153, 163, 165, 166.
Kelley *v.* Horton, 2 Cow. 424, § 64.
Kellinger *v.* Forty-second Street R. R., 50 N. Y. 206, §§ 203, 207.
Kellogg *v.* Malin, 50 Mo. 496, § 50.
—— *v.* Price, 42 Ind. 360, § 227.
Kelsey *v.* King, 32 Barb. 410, § 55.
Kemp *v.* Smith, 7 Ind. 471, § 91.
Kennedy *v.* Milwaukee R. R., 22 Wis. 581, §§ 74, 148.
Kennett's Petition, 24 N. H. 139, § 183.
Kent *v.* Wallingford, 42 Vt. 651, §§ 114, 319.
Kenton County Court *v.* Turnpike Co., 10 Bush, 529, §§ 32, 58.
Kerr (Matter of), 42 Barb. 119, §§ 42, 44, 60.
Kidder *v.* Jennison, 21 Vt. 108, § 95.
—— *v.* Oxford, 116 Mass. 165, §§ 175, 388.
Kile *v.* Yellowhead, 80 Ill. 208, §§ 115, 278, 329.
Killbuck Private Road, 77 Pa. 89, §§ 12, 27.
Kimble *v.* Whitewater Canal Co., 1 Ind. 285, § 87.
Kimel *v.* Kimel, 4 Jones L. 121, § 300.
Kine *v.* Defenbaugh, 64 Ill. 291, § 91.
King *v.* Iowa Midland R. R., 34 Iowa, 458, §§ 170, 220, 254.
—— *v.* Wycombe Rail. Co. 29 L. J. (Ch.) 462, § 120.
Kingman *v.* Plymouth, 6 Cush. 306, § 333.
Kingsland *v.* Clark, 24 Mo. 24, § 69.
Kip *v.* New York R. R., 13 N. Y. Sup. Ct. 24, § 63; 67 N. Y. 227, §§ 37, 63.
Kirtland *v.* Meriden, 39 Conn. 107, § 319.
Kissinger *v.* Hanselman, 33 Ind. 80, §§ 27, 101.
Knapp *v.* London, etc., Rail. Co., 32 L. J. (Exch.) 236, § 142.
—— *v.* McAuley, 39 Vt. 275, § 142.
Knauft *v.* St. Paul R. R., 22 Minn. 173, §§ 161, 175, 268.
Knight *v.* Carrollton R. R., 9 La. An. 284, § 59.
Knowles's Petition, 22 N. H. 361, § 24.
Koch *v.* Williamsport Co., 65 Pa. 288, §§ 87, 194.
Kohl *v.* United States, 91 U. S. 367, §§ 68, 261, 347, 349.
Kohlhepp *v.* West Roxbury, 120 Mass. 596, § 115.

Koppikus v. State Capital Commissioners., 16 Cal. 248, § 91.
Kramer v. Cleveland R. R., 5 Ohio St. 140, §§ 85, 94, 287, 322.
Kroop v. Forman, 31 Mich. 144, §§ 333, 356.
Kucheman v. C. C. & D. R. R., 46 Iowa, 366, §§ 32, 166, 203, 204.
Kuhlman v. Hecht, 77 Ill. 570, § 29.
Kyle v. Auburn R. R., 2 Barb. Ch. 489, § 218.

Lackland v. North Missouri R. R., 31 Mo. 180, §§ 200, 205.
Lacroix v. Medway, 12 Metc. 123, §§ 264, 319.
La Crosse R. R. v. Seeger, 4 Wis. 268, §§ 92, 161.
Lafayette v. Shultz, 4 Ind. 97, §§ 130, 312.
—— v. Spencer, 14 Ind. 399, § 195.
Lafayette Plank-road v. New Albany R. R., 18 Ind. 90, §§ 42, 216, 217.
—— v. Pickett, 25 Mo. 535, § 91.
Lafayette R. R. v. Smith, 6 Ind. 249, § 87.
—— v. Winslow, 66 Ill. 219, §§ 159, 168, 223.
Lake v. Virginia R. R., 7 Nev. 294, § 48.
Lake Erie R. R. v. Heath, 9 Ind. 558, § 91.
Lake Merced Water Co. v. Cowles, 31 Cal. 215, § 47.
Lake Shore R. W. v. Cincinnati R. W., 30 Ohio St. 604, § 44.
Lake Superior R. R. v. Greve, 17 Minn. 322, §§ 166, 203, 263.
Lamb v. Lane, 4 Ohio St. 167, § 91.
Lambert v. Hoke, 14 Johns. 383, § 26.
Lancashire Rail. Co. v. Evans, 15 Beav. 322. § 217.
Lancaster v. Kennebeck Co., 62 Me. 272, §§ 21, 311.
—— v. Pope, 1 Mass. 86, § 101.
—— v. Richardson. 4 Lans. 136, § 53.
Lance's Appeal, 55 Pa. 16, § 59.
Landaff (Petition of), 34 N. H. 163, § 287.
Lanesborough v. Berkshire, 22 Pick. 278, §§ 264, 267.
Langford v. Commissioners, 16 Minn. 375, § 85.
Lansing v. Caswell, 4 Paige, 519, § 121.
—— v. Smith, 8 Cow. 146, § 80; s. c., 4 Wend. 9, § 80.
Lawler v. Baring Boom Co., 56 Mo. 443, §§ 21, 182.
Lawrence v. Boston, 119 Mass. 126, §§ 65, 168, 171.
—— v. Great Northern Rail. Co., 16 Q. B. 643, §§ 216, 217, 220.
Leach v. Day, 27 Cal. 643, § 64.
Leak v. Selma R. R., 47 Ga. 345, § 338.
Leavitt v. Cambridge, 120 Mass. 157, § 49.
Lebanon v. Olcott, 1 N. H. 339, §§ 64, 88.
Lecour v. Police Jury, 20 La. An. 303, § 11.
Lee v. North-Western R. R., 33 Wis. 222, § 322.
—— v. Pembroke Iron Co., 57 Me. 481, §§ 64, 78, 88.
—— v. Tebo R. R., 53 Mo. 178, § 244.
Lefevre's Appeal, 32 Cal. 565, § 160.
Legg v. Belfast Rail. Co., 1 L R. C. L. 124 n, § 68.
Lehigh Valley R. R. v. Lazarus, 28 Pa. 203, § 163.
—— v. Trone, 28 Pa. 203, §§ 79, 82.
Lehmicke v. St. Paul R. R., 19 Minn. 464, §§ 165, 169, 170.
Leisse v. St. Louis & Iron Mountain R. R., Mo. Ct. App., § 311.
Leland v. Woodbury, 4 Cush. 245, § 291.
Leonard v. Wading River Co., 118 Mass. 235, § 292.
Leslie v. St. Louis, 47 Mo. 474, § 107.
Levering v. Philadelphia R. R., 8 Watts & S. 459, § 139.
Lewenthal v. New York, 5 Lans. 532, § 358.
Lewes v. Cambrian R. R., 36 L. J. (Ch.) 565, § 144.
Lewis v. Jones, 1 Pa. St. 226, § 56.
—— v. Rough, 23 Ind. 398, § 90.
—— v. Smith, 1 A. K. Marsh. 159, § 114.

Lewis St. (Matter of), 2 Wend. 472, § 225.
Lewiston v. Commissioners, 30 Me. 19, §§ 115, 277.
Lexington v. Long, 31 Mo. 369, § 86.
—— v. McQuillan's Heirs, 9 Dana, 518, § 2.
Lexington R. R. v. Applegate, 8 Dana, 289, §§ 201, 206.
—— v. Fitchburg R. R., 14 Gray, 266, § 44.
—— v. McMurtry, 8 B. Mon. 516, § 85.
Limerick Turnpike Co.'s Appeal, 80 Pa. 425, § 189.
Linblom v. Ramsey, 75 Ill. 246, §§ 274, 275, 284.
Lincoln v. Colusa County, 28 Cal. 662, §§ 105, 107.
Lind v. Clemens, 44 Mo. 540, § 107.
Lindell's Administrator v. Hannibal & St. Joe R. R., 6 Mo. 543, §§ 87, 89.
Lindsay v. Commissioners, 2 Bay, 38, § 125.
Linsley v. Hubbard, 44 Conn. 109, § 9.
Little v. Dublin & Drogheda Rail. Co., 7 I. R. C. L. 82, § 81.
—— v. Thompson, 24 Ind. 146, § 271.
Little Miami R. R. v. Commissioners, 31 Ohio St. 338, § 198.
—— v. Dayton, 23 Ohio St. 510, § 45.
—— v. Naylor, 2 Ohio St. 235, § 53.
—— v. Whitacre, 8 Ohio St. 590, §§ 64, 87.
Livermore v. Jamaica, 23 Vt. 361, § 151.
Liverpool Improvement Act (*In re*), 16 W. R. 667, § 335.
Livingston v. Mayor of New York, 8 Wend. 85, §§ 91, 151, 225.
Local Board of Health v. Jones, 26 L. J. (Exch.) 33, § 270.
Lockwood v. Gregory, 4 Day, 407, § 275.
Lodge v. Philadelphia R. R., 8 Phila. 345, §§ 58, 59.
Logansport v. McMillen, 49 Ind. 493, § 165.
Logansport R. R. v. Buchanan, 52 Ind. 163, § 174.
Lohman v. St. Paul R. R., 18 Minn. 174, § 142.
London & North-Western Rail. Co. v. Bradley, 6 Eng. Rail. Cas. 551, § 193.
Long (Appeal of), Pa. Sup. Ct., § 93.
Long v. Fuller, 63 Pa. 170, §§ 17, 126.
Long Island R. R. (Matter of), 6 N. Y. Sup. Ct. 298, § 148.
Long Island R. R. v. Bennett, 17 N. Y. Sup. Ct. 91, §§ 97, 151.
Loomis v. Andrews, 49 Cal. 239, § 180.
Loop v. Chamberlain, 20 Wis. 135, § 89; 17 Wis. 504, §§ 89, 90.
Loring v. Boston, 12 Gray, 203, § 341.
Loughbridge v. Harris, 42 Ga. 500, § 15.
Louisville v. Rolling-Mill Co., 8 Bush, 416, § 207.
Louisville, etc., R. R. v. Covington, 2 Bush, 523, § 51.
—— v. Glazebrook, 1 Bush, 325, § 153.
—— v. Louisville City R. W., 2 Duv. 175, §§ 88, 89.
—— v. Thompson, 18 B. Mon. 785, § 142.
Louisville R. R. v. Brown, 17 B. Mon. 763, §§ 195, 200.
Low v. Galena R. R., 18 Ill. 324, §§ 59, 223.
Lowell v. Boston R. R., 23 Pick. 24, § 220.
—— v. Shaw, 15 Me. 242, § 303.
Loweree v. Newark, 38 N. J. L. 151, §§ 124, 125, 149.
Lull v. Curry, 10 Mich. 397, § 77.
Lumbard v. Stearns, 4 Cush. 60, § 18.
Lumsden v. Milwaukee, 8 Wis. 485, §§ 85, 250.
Lund v. New Bedford, 121 Mass. 283, §§ 30, 116.
Luntley (*Re*), 14 W. R. 93, § 68.
Lyman v. Burlington, 22 Vt. 131, §§ 237, 239, 241, 333.
Lynch v. Stone, 4 Denio, 353, § 49.
Lyon v. G. B. & M. R. R., 42 Wis. 538, § 148.
—— v. Jerome, 23 Wend. 485, § 60.

Macey *v.* Metropolitan Board of Works, 33 L. J. (Ch.) 377, § 203.
Macon *v.* Owen, 3 Ala. 116, §§ 115, 303.
Macon R. R. *v.* Bowen, 45 Ga. 581, § 111.
Macy *v.* Indianapolis, 17 Ind. 267, § 195.
Magnolia St. (Matter of), 8 Phila. 468, § 286.
Mahon *v.* New York Central R. R., 24 N. Y. 658, § 32.
—— *v.* Utica R. R., Lalor, 156, § 82.
Mahony *v.* Spring Valley Water-Works, — Cal. —, § 63.
Mairs *v.* Gallahue, 9 Gratt. 94, § 303.
Makepeace *v.* Worden, 1 N. H. 16, § 53.
Mallard *v.* Lafayette, 5 La. An. 112, § 318.
Malone *v.* Toledo, 28 Ohio St. 643, §§ 50, 57.
Manhattan Co., *ex parte*, 22 Wend. 653, §§ 46, 62.
Manser *v.* North-Eastern Rail. Co., 2 Eng. Rail. Cas. 380, § 220.
Mansfield R. R. *v.* Clark, 23 Mich. 519, §§ 160, 251, 275.
Marble *v.* Whitney, 28 N. Y. 297, § 111.
March *v.* Portsmouth R. R., 19 N. H. 372, §§ 81, 170, 175, 180, 213.
Marcy *v.* Fries, 18 Kan. 353, §§ 135, 300.
Market Street R. R. *v.* Central R. R., 51 Cal. 583, § 205.
Markham *v.* Brown, 37 Ga. 277, § 7.
—— *v.* Mayor, 23 Ga. 402, § 207.
Marquette R. R. *v.* Harlow, 37 Mich. 554, § 90.
Marsh (Matter of), 71 N. Y. 315 §§ 107, 356.
Marshall Fishing Co. *v.* Hadley Falls Co., 5 Cush. 602, § 336.
Marson *v.* London Rail. Co., 37 L. J. (Ch.) 483, § 120.
Martin *v.* Dix, 52 Miss. 53, §§ 2, 348.
——, *ex parte*, 13 Ark. 198, § 1.
—— *v.* Leicester Water-Works Co., 27 L. J. (Exch.) 432, § 338.
Martin *v.* London, Chatham & Dover Rail. Co., 35 L. J. (Ch.) 795; L. R. 1 Eq. 145, §§ 65, 148.
—— *v.* Mayor of Brooklyn, 1 Hill, 545, §§ 311, 312.
—— *v.* Rushton, 42 Ala. 289, §§ 288, 296.
Martinsville R. R. *v.* Bridges, 6 Ind. 400, § 89.
Mason *v.* Brooklyn City R. R., 35 Barb. 378, § 58.
—— *v.* Kennebec R. R., 31 Me. 215, §§ 87, 216, 220.
Massachusetts R. R. *v.* Boston R. R., 121 Mass. 124, § 44.
Mayo *v.* Turner, 1 Munf. 405, § 289.
Mayor *v.* Bailey, 2 Denio, 433, § 220.
—— *v.* Central R. R., 58 Ga. 120, §§ 46, 61, 158.
—— *v.* Delachaise, 22 La. An. 26, § 84.
—— *v.* Hopkins, 13 La. 326, § 317.
—— *v.* Nichol, 59 Tenn. 338, § 197.
—— *v.* Perkins, 30 Ga. 154, § 130.
—— *v.* Richardson, 1 Stew. & P. 12, §§ 145, 161.
Mayor of Helena *v.* Thompson, 29 Ark. 569, § 190.
Mayor of Macon *v.* Hill, 58 Ga. 595, §§ 54, 195.
Mayor of New York *v.* Lord, 18 Wend. 126, §§ 4, 5; 17 Wend. 285, §§ 4, 5.
McArthur *v.* Kelly, 5 Ohio, 139, § 28.
—— *v.* McEachin, 64 N. C. 454, § 60.
McAulay *v.* Western R. R., 33 Vt. 311, §§ 140, 141, 142.
McAuley *v.* Chicago R. R., 83 Ill. 348, §§ 61, 63.
McCann *v.* Sierra County, 7 Cal. 121, § 128.
McCarthy *v.* Syracuse, 46 N. Y. 194, § 56.
McCauley *v.* Dunlap, 4 B. Mon. 57, § 26.
—— *v.* Weller, 12 Cal. 500, § 85.
McClary *v.* Hartwell, 25 Mich. 139, § 275.
McClelland *v.* Miller, 23 Ohio St. 488, § 323.

McClenachan v. Curwen, 6 Binn. 509, § 125.
McClinton v. Pittsburgh R. R., 66 Pa. 404, §§ 88, 846.
McCollister v. Shuey, 24 Iowa, 362, § 93.
McCombs v. Akron, 15 Ohio, 474, § 196.
McCord v. High, 24 Iowa, 336, § 64.
McCormack v. Terre Haute R. R., 9 Ind. 283, § 87.
McCormick v. Lafayette, 1 Ind. 48, § 130.
—— v. St. Joseph R. R., 57 Mo. 433, § 220.
McCoy v. Grandy, 8 Ohio St. 468, § 9.
McCrory v. Griswold, 7 Iowa, 248, §§ 322, 333.
McDonald v. Red Wing, 13 Minn. 38, § 4.
McDougle v. Clark, 7 B. Mon. 448, § 288.
McFadden v. Johnson, 72 Pa. 335, § 66.
McIntire v. Easton R. R., 26 N. J. Eq. 425, § 76.
—— v. The State, 5 Blackf. 384, § 149.
—— v. Western R. R., 67 N. C. 278, §§ 87, 124.
McKee v. St. Louis, 17 Mo. 184, §§ 261, 267.
McKeen v. Delaware Division Canal, 49 Pa. 424, § 80.
McKenney v. Commissioners, 40 Me. 136, § 187.
McKinney v. Monongahela Nav. Co., 14 Pa. 65, § 87.
McLauchlin v. Charlotte R. R., 5 Rich. 583, §§ 1, 31, 87, 195, 340.
McLaughlin v. Municipality, 5 La. An. 504, § 313.
McLellan v. Commissioners, 21 Me. 390, § 280.
McLendon v. Atlanta R. R., 54 Ga. 293, § 66.
McMahon v. Cincinnati R. R., 5 Ind. 413, § 149.
McMasters v. The Commonwealth, 3 Watts, 292, § 149.
McMicken v. Cincinnati, 4 Ohio St 394, § 85.
McOsker v. Burrell, 55 Ind. 425, § 126.
McWhirter v. Cockroll, 2 Head, 9, § 275.
Meacham v. Fitchburg R. R., 4 Cush. 291, §§ 74, 152, 158, 247.
Mead v. Hein, 28 Wis. 533, § 303.
Meares v. Wilmington, 9 Ired. 73, § 195.
Meily v. Zurmehly, 23 Ohio St. 627, § 138.
Mellen v. Western R. R., 4 Gray, 301, §§ 64, 220.
Memphis v. Bolton, 9 Heisk. 503, §§ 153, 158, 158.
Memphis Freight Co. v. Memphis, 4 Coldw. 419, §§ 10, 21.
Memphis v. Water Co., 5 Tenn. 495, § 55.
Memphis R. R. v. Payne, 37 Miss. 700, § 130.
Mendez v. Dugart, 17 La. An. 171, § 51.
Menges v. Albany, 56 N. Y. 374, § 226.
Mercer v. Pittsburg R. R., 36 Pa. 99, § 200.
—— v. Williams, Walk. Ch. (Mich.) 85, § 139.
Merrill v. Berkshire, 11 Pick. 269, §§ 255, 262, 282, 324.
Methodist Church v. Baltimore, 6 Gill, 391, § 61.
Metropolitan Board v. Metropolitan Rail. Co., 38 L. J. (C. P.) 172, § 184.
Metropolitan R. R. v. Highland R. R., 118 Mass. 290, § 44.
—— v. Quincy R. R., 12 Allen, 262, § 44.
Metler, 37 N. J. L. 222, §§ 174, 175, 333.
Mettler v. Easton R. R., 25 N. J. Eq. 214, § 139.
Micklethwait v. Winter, 20 L. J. (Exch.) 313, § 52.
Midland Rail. Co. v. Checkley, 36 L. J. (Ch.) 390; L. R. 4 Eq 19, § 52.
—— v. Wescomb, 2 Eng. Rail. Cas. 211, § 335.

Mifflin v. Railroad, 16 Pa. 182, § 200.
Milhau v. Sharp, 15 Barb. 193, §§ 55, 203.
Milhollin v. Thomas, 7 Ind. 165, § 97.
Military Parade Ground, 60 N. Y. 319, §§ 311, 314.
Milwaukee v. Milwaukee R. R., 7 Wis. 85, § 204.
Milwaukee R. R. v. Eble, 4 Chand. 72, §§ 152, 153. 174, 212.
—— v. Faribault, 23 Minn. 167, §§ 11, 46.
Milburn v. Cedar Rapids, 12 Iowa, 246, §§ 201, 203.
Mills v. St. Clair County, 8 How. 569, § 348.
Miller v. Auburn R. R., 6 Hill, 61, § 142.
—— v. Bridgewater, 24 N. J. L. 54, § 145.
—— v. Brown, 56 N. Y. 333, §§ 107, 238.
—— v. Craig, 11 N. J. Eq. 175, § 45.
—— v. Mayor of Newark, 35 N. J. L. 460, § 160.
—— v. New York R. R., 21 Barb. 513, § 43.
—— v. Stowman, 26 Ind. 148, § 296.
—— v. Troost, 14 Minn. 365, § 15.
Minnesota R. R. v. Doran, 17 Minn. 188, §§ 92, 153, 162; 15 Minn. 280, § 167.
Minot v. Cumberland Commissioners, 28 Me. 121, §§ 160, 234.
—— v. McNamara, 13 Minn. 508, § 153.
Mississippi River Bridge Co. v. Ring, 58 Mo. 491, §§ 152, 166, 173, 223, 232.
Mississippi R. R. v. Byington, 14 Iowa, 572, § 329.
—— v. Devaney, 42 Miss. 555, §§ 58, 59.
—— v. Rosseau, 8 Iowa, 373, § 109.
Missouri R. R. v. Haines, 10 Kan. 439, § 216.
—— v. Owen, 9 Kan. 409, §§ 77, 146, 165, 172, 175.
—— v. Ward, 10 Kan. 352, § 90.
Mitchell v. Bass, 33 Texas, 259, § 51.
Mitchell v. Harmony, 13 How. 115, § 8.
—— v. Illinois R. R., 68 Ill. 286, §§ 91, 136.
—— v. Rome, 49 Ga. 19, § 195.
—— v. Thornton, 21 Gratt. 164, §§ 158, 242.
—— v. Turnpike Co., 3 Humph. 456, § 87.
Mix v. Lafayette R. R., 67 Ill. 319, §§ 167, 173, 180.
Moale v. Baltimore, 5 Md. 314, §§ 2, 170, 225.
Mobile v. Yuille, 3 Ala. (N. S.) 140, § 9.
Mobley v. Breed, 48 Ga. 44, §§ 89, 101.
Mohawk Bridge v. Utica R. R., 6 Paige, 554, §§ 89, 115.
Mohawk R. R. v. Artcher, 6 Paige, 83, § 83.
Molett v. Keenan, 22 Ala. 484, §§ 95, 250, 251.
Moll v. Benckler, 30 Wis. 584, § 279.
Monagle v. Bristol, 8 Cush. 360, §§ 330, 344.
Monongahela Nav. Co. v. Coon, 6 Pa. 379, §§ 61, 194.
Monongahela Nav. Co. v. Coons, 6 Watts & S. 101, § 88.
Monson Mfg. Co. v. Fuller, 15 Pick. 554, § 298.
Montclair R. R. v. Benson, 36 N. J. L. 557, § 170.
Montgomery R. R. v. Varner, 19 Ala. 185, §§ 164, 165.
—— v. Walton, 14 Ala. 207, § 147.
Montmorency Road v. Rock, 41 Ind. 264, § 212.
—— v. Stockton, 48 Ind. 328, §§ 166, 216.
Moore v. Boston, 8 Cush. 274, §§ 67, 341.
—— v. Great Southern Rail. Co., 10 I. R. C. L. 46, § 207.
—— v. Mayor of New York, 8 N. Y. 110, § 71; 4 Sandf. 456, § 71.
Moorhead v. Little Miami R. R., 17 Ohio, 340, §§ 58, 59.
Moran v. McClearns, 63 Barb. 185, § 56.

Moran *v.* Troy, 16 N. Y. Sup. Ct. 540, § 2.
Morgan *v.* Banta, 1 Bibb, 579, § 288.
—— *v.* Chicago R. R., 86 Mich. 428, § 98.
—— *v.* King, 35 N. Y. 454, § 81; 18 Barb. 277, § 81.
Morris *v.* Schallsville Branch R. R., 4 Bush, 448, § 120.
—— *v.* Turnpike Road, 6 Bush, 671, § 51.
Morris Canal Co. *v.* Ryerson, 27 N. J. L. 457, § 220.
—— *v.* Seward, 23 N. J. L. 219, § 80.
—— *v.* The State, 24 N. J. L. 62, § 43; 14 N. J. L. 411, § 333.
—— *v.* Townsend, 24 Barb. 658, §§ 60, 61.
Morris R. R. *v.* Blair, 9 N. J. Eq. 635, § 47.
—— *v.* Central R. R., 31 N. J. L. 205, §§ 46, 47, 58.
—— *v.* Hudson Tunnel Co., 25 N. J. Eq. 384, §§ 86, 134.
—— *v.* Newark, 10 N. J. Eq. 352, § 204.
Morrison *v.* Bucksport R. R., 67 Me. 353, § 189.
Morse, petitioner, 18 Pick. 443, §§ 112, 338.
Morseman *v.* Ionia, 32 Mich. 283, § 107.
Morss *v.* Boston R. R., 2 Cush. 536, § 113.
Mortimer *v.* South Wales Rail. Co., 28 L. J. (Q. B.) 129, § 160.
Moses *v.* Pittsburgh R. R., 21 Ill. 516, §§ 199, 201.
Mossman *v.* Forrest, 27 Ind. 233, § 278.
Mount Washington Road, 35 N. H. 134, §§ 1, 14, 18, 91, 128, 132, 166, 191.
Mouse's Case, 12 Coke, 62, § 4.
Muire *v.* Falconer, 10 Gratt. 12, §§ 76, 97, 99.
Muller *v.* Earle, 3 Jones & S. 461, § 68.
Munford *v.* Terry, 2 Car. L. Repos. 308, § 291.
Munger *v.* Tonawanda R. R., 4 N. Y. 349, § 208.
Munn *v.* The People, 69 Ill. 80, § 9.
—— *v.* Illinois, 94 U. S. 113, § 9.
Munns *v.* Isle of Wight Rail. Co., 17 W. R. 1081, § 144.
Munkers *v.* Kansas City R. R., 60 Mo. 334, §§ 189, 211.
Munson *v.* Mallory, 36 Conn. 165, § 55.
Murdock *v.* Prospect Park R. R., 17 N. Y. Sup. Ct. 598, § 111.
Murphy *v.* Chicago, 29 Ill. 279, §§ 199, 201, 207.
—— *v.* DeGroot, 44 Cal. 51, § 135.
Murray *v.* Berkshire, 12 Metc. 455, § 34.
Myers *v.* Simms, 4 Iowa, 500, § 202.

Nadin, *ex parte*, 17 L. J. (Ch.) 421, § 68.
Nash (*In re*), 25 L. J. (Ch.) 20, § 335.
—— *v.* Upper Appomattox County, 5 Gratt. 332, §§ 218, 294.
Nashville R. R. *v.* Cowardin, 11 Humph. 348, § 59.
Nason *v.* Woonsocket R. R., 4 R. I. 377, § 180.
Neal *v.* Pittsburgh R. R., 31 Pa. 19, § 311; 2 Grant Cas. 137, § 315.
—— *v.* Knox R. R., 61 Me. 298, § 67.
Nebraska R. R. *v.* Van Deusen, — Neb. — , §§ 136, 322.
Necld's Road, 1 Pa. 353, § 72.
Neff *v.* Cincinnati, — Ohio, —, §§ 92, 255.
Nelson *v.* Fleming, 56 Ind. 310 (1877), § 50.
—— *v.* Vermont Central R. R., 26 Vt. 717, § 7.
Nesbitt *v.* Trumbo, 39 Ill. 110, § 26.
Nevins *v.* Peoria, 41 Ill. 502, § 196.
New Albany R. R. *v.* O'Daily, 13 Ind. 353, § 51.
New Bedford *v.* Bristol, 9 Gray, 346, § 313.
New Britain *v.* Sargent, 42 Conn. 137, §§ 173, 322.
Newby *v.* Platte County, 25 Mo. 258, §§ 2, 149, 152, 162.

Newcastle R. R. v. Brumback, 5 Ind. 543, § 153.
—— v. Peru R. R., 8 Ind. 464, §§ 40, 42, 46.
Newcomb v. Smith, 1 Chand. 71, § 15.
Newell v. Wheeler, 48 N. Y. 486, § 84.
New Haven v. Sargent, 38 Conn. 50, § 74.
New Haven Co. v. Northampton, 102 Mass. 116, §§ 333, 336, 338.
New Jersey R. R. v. Long Branch Commissioners, 39 N. J. L. 28, § 46.
—— v. Suydam, 17 N. J. L. 25, §§ 245, 333.
New Orleans v. Sohr, 16 La. An. 393, § 84.
—— v. United States, 10 Pet. 662, § 45.
New Orleans R. R. v. Frederic, 46 Miss. 1, §§ 65, 103.
—— v. Hemphill, 35 Miss. 17, §§ 94, 227, 228, 248.
—— v. Lagarde, 10 La. An. 150, §§ 180, 158.
—— v. Moye, 39 Miss. 374, § 111.
—— v. Second Municipality, 1 La. An. 128, § 59.
—— v. Zeringue, 28 La. An. 521, § 241.
New Orleans Telegraph Co. v. Southern Telegraph Co., 53 Ala. 211, §§ 21, 30, 37.
Newport Bridge v. Foote, 9 Bush, 264, § 207.
Newport Highway, 48 N. H. 433, § 236.
New River Co. v. Johnson, 29 L. J. (M. C.) 93, § 81.
Newton v. Agricultural Branch R. R., 15 Gray, 27, § 268.
Newville Road, 8 Watts, 172, § 111.
New York & Boston R. R. (Matter of), 62 Barb. 85, §§ 117, 122.
New York Central R. R. (Matter of), 11 N. Y. Sup. Ct. 381, § 58; 13 N. Y. Sup. Ct. 149, §§ 167, 173; 60 N. Y. 116, §§ 76, 138; 64 N. Y. 60, § 232; 66 N. Y. 407, § 11; 20 Barb. 419, § 74.
New York, etc., R. R. v. Boston R. R., 36 Conn. 196, §§ 40, 42, 58.
—— v. Forty-second Street R. R., 50 496, § 210.
—— v. Gunnison, 8 N. Y. Sup. Ct. Barb. 285, § 39.
—— v. Kip, 46 N. Y. 546, §§ 48, 49, 59; 18 N. Y. Sup. Ct. 24, § 49.
—— v. Metropolitan Gas-Light Co., 68 N. Y. 321, §§ 47, 59.
—— v. Young, 33 Pa. 175, §§ 38, 39, 60, 62.
Ney v. Swinney, 36 Ind. 454, §§ 109, 323, 333.
Niagara Co. v. Bachman, 4 Lans. 523, §§ 53, 54.
Niagara R. R. v. Hotchkiss, 16 Barb. 270, § 334.
Nichols v. Bridgeport, 23 Conn. 189, §§ 149, 151.
—— v. Salem, 14 Gray, 490, §§ 90, 238.
—— v. Somerset R. R., 43 Me. 353, § 129.
Nicholson v. Stockett, Walk. (Miss.) 67, § 51.
Ninth Avenue (Matter of), 45 N. Y. 729, §§ 46, 351.
Noble St., 1 Ashm. 276, § 76.
Nobles v. Langly, 66 N. C. 237, § 56.
Nolensville Turnpike v. Baker, 4 Humph. 315, § 34.
Noll v. Dubuque R. R., 32 Iowa, 66, § 320.
Norfleet v. Cromwell, 70 N. C. 634, §§ 16, 355.
Norris v. Clymer, 2 Pa. 277, § 25.
—— v. Philadelphia, 70 Pa. 332, § 175.
—— v. Vermont Central R. R., 23 Vt. 99, §§ 81, 110.
Norristown Turnpike Co. v. Burket, 26 Ind. 53, §§ 90, 91, 161.
North-East R. R. v. Sineath, 8 Rich. L. 185. § 212.
North Missouri R. R. v. Gott, 25 Mo. 540, §§ 11, 60.
—— v. Lackland, 25 Mo. 515, §§ 311, 322.
North Pennsylvania R. R. v. Davis, 26 Pa. 288, §§ 65, 68.

Northern Central Coal Co. v. Coal & Iron Co., 37 Md. 537, §§ 10, 11, 28, 323,
Northern R. R. v. Concord R. R., 27 N. H. 183, § 45.
Northampton Bridge, 116 Mass. 442, § 240.
Norton v. Walkill R. R., 61 Barb. 476, § 62.
—— v. Walkill Valley R. R., 63 Barb. 77, § 103.
Noyes v. Chapin, 6 Wend. 461, §§ 110, 111.
Null v. Whitewater Canal Co., 4 Ind. 431, § 341.
Nutting v. Page, 4 Gray, 581, § 295.

O'Brien v. Norwich R. R., 17 Conn. 372, § 78.
Occum Co. v. Sprague Co., 35 Conn. 496, §§ 15, 23, 296.
O'Connor v. Pittsburgh, 18 Pa. 187, § 195.
O'Hara v. Lexington R. R., 1 Dana, 232, § 14.
—— v. Pennsylvania R. R., 25 Pa. 445, §§ 107, 119.
Ohio, etc., R. R. v. Wallace, 14 Pa. 245, § 246.
Old Colony R. R. v. Plymouth, 14 Gray, 155, §§ 33, 44, 154.
Oliphant v. Commissioners of Atchison County, 18 Kan. 386, §§ 271, 346.
Olmstead v. Camp, 33 Conn. 532, §§ 13, 15.
Omaha R. R. v. Menk, 4 Neb. 21, § 253.
O'Reiley v. Draining Co., 32 Ind. 169, §§ 12, 16.
Oregon R. R. v. Bailey, 3 Oreg. 164, § 47.
—— v. Barlow, 3 Oreg. 311, §§ 90, 92, 163, 220.
—— v. Oregon Nav. Co., 3 Oreg. 178, §§ 105, 254, 259.
Orr v. Quimby, 54 N. H. 590, §§ 21, 126, 127, 347.
Osborn v. Hart, 24 Wis. 89, § 26.
Overman v. May, 35 Iowa, 89, §§ 51, 52.
Owen v. Jordan, 27 Ala. 608, §§ 250, 255.
Owners v. Mayor of Albany, 15 Wend. 374, §§ 98, 157.

Pace v. Freeman, 10 Ired. 103, § 305.
Pacific R. R. v. Chrystal, 25 Mo. 544, §§ 152, 162.
—— v. Leavenworth, 1 Dill. 393, § 204.
Page v. Boston, 103 Mass. 84, § 197.
—— v. Chicago R. R., 70 Ill. 324, §§ 149, 151, 167.
—— v. Heineberg, 40 Vt. 81, § 110.
Paine v. Boston, 4 Allen, 168, § 170.
—— v. Leicester, 22 Vt. 44, § 333.
—— v. Woods, 108 Mass. 160, §§ 294, 300, 301.
Palairet's Appeal, 67 Pa. 479, § 25.
Palmer v. The State, Wright (Ohio), 364, § 14.
Palmer Co. v. Ferrill, 17 Pick. 58, §§ 298, 299, 300, 322.
Palmyra v. Morton, 25 Mo. 593, § 149.
Panton Turnpike v. Bishop, 11 Vt. 198, § 84.
Parham v. Justices, 9 Ga. 341, §§ 4, 10, 89, 128, 315.
Paris v. Mason, 37 Texas, 447, §§ 90, 149.
Parish v. Gilmanton, 11 N. H. 293, §§ 97, 101, 103.
Parke's Appeal, 64 Pa. 137, § 62.
Parker v. Boston R. R., 3 Cush. 107, §§ 31, 183, 185, 207, 326.
—— v. Cutler Milldam, 20 Me. 353, § 78.
Parker, petitioner, 36 N. H. 84, § 103.
Parks v. Boston, 8 Pick. 218, §§ 24, 333; 15 Pick. 198, §§ 65, 69.
—— v. Hampden, 120 Mass. 395, § 153.
—— v. Wisconsin R. R., 33 Wis. 413, §§ 165, 166.
Parmelee v. Oswego R. R., 7 Barb. 599, § 40.
Parnell v. Commissioners, 34 Ala. 278, § 269.
Parrot v. Cincinnati R. R., 10 Ohio St. 624, § 193, 200.
Parsons v. Howe, 41 Me. 218, § 123.

Parsons v. Pettingell, 11 Allen, 507, § 5.
Paschall St. (*In re*), 81 Pa. 118, § 91.
Passmore v. Philadelphia R. R., Phila. (C. P.), § 65.
Patchen v. Morrison, 3 Vt. 590, § 286.
Patchin v. Brooklyn, 2 Wend. 377, §§ 254, 281.
Patrick v. Commissioners, 4 McCord, 541, § 1.
Patten's Petition, 16 N. H. 277, § 241.
Patten v. Northern Central R. R., 33 Pa. 426, §§ 166, 193.
Patterson v. Baumer, 43 Iowa, 477, § 356.
—— v. Boom Co., 3 Dill. 465, §§ 21, 168, 170, 173, 174, 349.
—— v. Boston, 20 Pick. 159, §§ 69, 70, 192; 23 Pick. 425, §§ 70, 192.
—— v. Chicago R. R., 75 Ill. 588, §§ 194, 203.
Paul v. Detroit, 32 Mich. 108, §§ 26, 49, 85, 91, 255, 256.
Payne v. Taylor, 3 A. K. Marsh. 328, § 288.
Peabody v. Sweet, 3 Ind. 514, § 95.
Pearce v. Gilmer, 54 Ill. 25, § 284.
Pearl St. (Matter of), 19 Wend. 651, §§ 243, 246.
Peavey v. Calais R. R., 30 Me. 498, §§ 58, 62.
—— v. Wolfborough, 37 N. H. 286, §§ 72, 97, 235.
Peck v. Smith, 1 Conn. 103, § 56.
—— v. Van Rensselaer, 8 Blackf. 312, § 332.
—— v. Whitney, 6 B. Mon. 117, § 254.
Peckham v. Lebanon, 39 Conn. 231, § 279.
—— v. School District, 7 R. I. 545, §§ 17, 234.
Peddicord v. Baltimore Passenger R. W., 34 Md. 468, § 205.
Peirce v. Somersworth, 10 N. H. 369, § 34.
Pekin v. Brereton, 67 Ill. 477, §§ 199, 207.
—— v. Winkel, 77 Ill. 56, § 199.
Pell v. Northampton Rail. Co., L. R. 2 Ch. App. 100, § 144.
Peninsular R. W. v. Howard, 20 Mich. 18, § 249.
Pennsylvania Canal v. Hill, 6 W. N. C., No. 14 (Pa.), § 32.
Pennsylvania R. R. v. Bruner, 55 Pa. 318, §§ 115, 119.
—— v. Bunnell, 81 Pa. 414, §§ 159, 168, 170.
—— v. Heister, 8 Pa. 445, § 246.
—— v. Keiffer, 22 Pa. 356, §§ 237, 333.
—— v. Lutheran Congregation, 53 Pa. 445, §§ 234, 246.
—— v. New York R. R., 23 N. J. Eq. 157, § 351.
—— v. Porter, 29 Pa. 165, §§ 115, 243.
Penny (*In re*), 7 El. & Bl. 660, §§ 182, 333.
—— v. Penny, 37 L. J. (Ch.) 340, §§ 168, 333.
—— v. South-Eastern Rail. Co., 26 L. J. (Q. B.) 225, § 333.
Penrice v. Wallis, 37 Miss. 172, §§ 127, 151.
People (The) v. Board of Spring Wells, 12 Mich. 434, § 283.
—— v. Board of Supervisors, 20 Mich. 95, § 318.
—— v. Bowen, 30 Barb. 24, § 55.
—— v. Brighton, 20 Mich. 57, § 275.
—— v. Brooklyn, 1 Wend. 318, § 312.
—— v. Burton, 65 N. Y. 452, §§ 97, 333.
—— v. Canal Appraisers, 33 N. Y. 461, § 80.
—— v. Canal Board, 7 Lans. 220, § 333.
—— v. Collins, 19 Wend. 56, § 322.
—— v. Commissioners of Greenbush, 24 Wend. 367, § 324.
—— v. Commissioners of Highways, 57 N. Y. 549, § 121; 1 N. Y. Sup. Ct. 193, § 318.
—— v. Commissioners of Milton, 37 N. Y. 360, § 280.
—— v. Commissioners of Nankin, 14 Mich. 528, § 101.
—— v. Commissioners of Palatine, 53 Barb. 70, § 351.
—— v. Cortelyou, 36 Barb. 164, §§ 269, 331.

People (The) v. Eldredge, 10 N. Y. Sup. Ct. 541, § 52.
—— v. Ferris, 41 Barb. 121, § 242.
—— v. First Judge, 2 Hill, 398, §§ 251, 333.
—— v. Goodwin, 5 N. Y. 568, § 111.
—— v. Griswold, 2 N. Y. Sup. Ct. 351, § 318; 67 N. Y. 59, § 818.
—— v. Haines, 49 N. Y. 587, § 357.
—— v. Hawley, 3 Mich. 330, § 8.
—— v. Hayden, 6 Hill, 359, § 124.
—— v. Hynds, 30 N. Y. 470, § 230.
—— v. Judges Dutchess County, 23 Wend. 360, § 121.
—— v. Kerr, 27 N. Y. 188, §§ 51, 202, 203, 205; 38 Barb. 369, § 51.
—— v. Kingman, 24 N. Y. 559, §§ 81, 121, 279, 322.
—— v. Kniskern, 54 N. Y. 52, § 95.
—— v. La Grange, 2 Mich. 187, §§ 98, 145, 175.
—— v. Lake Co., 33 Cal. 487, §§ 85, 331.
—— v. Lawrence, 54 Barb. 589, §§ 57, 333.
—— v. Lowell, 9 Mich. 144, § 145.
—— v. Mayor of Brooklyn, 4 N. Y. 419, § 2.
—— v. McNeil, 2 N. Y. Sup. Ct. 140, § 281.
—— v. McRoberts, 62 Ill. 38, §§ 91, 136, 338.
—— v. Michigan Southern R. R., 3 Mich. 496, § 144.
—— v. Mott, 9 N. Y. Sup. Ct. 672, § 238.
—— v. Murray, 5 Hill, 468, § 326.
—— v. Nearing, 27 N. Y. 306, §§ 128, 357.
—— v. New York R. R., 45 Barb. 73, §§ 47, 59.
—— v. Osborn, 20 Wend. 186, § 97.
—— v. Robinson, 29 Barb. 77, §§ 65, 67.
—— v. Scio, 3 Mich. 121, § 145.
—— v. Smith, 21 N. Y. 595, §§ 84, 91.
—— v. Stewart, 41 Barb. 121, § 242.
—— v. Supervisors, 4 Barb. 64, § 93.
—— v. Supervisors, 19 Wend. 102, § 212.
People (The) v. Supervisors Allegany County, 36 How. Pr. 544, § 95.
—— v. Supervisors Richmond County, 20 N. Y. 252, § 118.
—— v. Syracuse, 20 How. Pr. 491, § 312.
—— v. Tallman, 36 Barb. 222, § 102.
—— v. Taylor, 34 Barb. 481, § 251.
—— v. Third Avenue R. R., 45 Barb. 63, § 36.
—— v. Town of Seward, 27 Barb. 94, §§ 275, 333.
—— v. Tubbs, 59 Barb. 401, § 62.
—— v. Wasson, 64 N. Y. 167, § 328.
—— v. White, 11 Barb. 26, § 50; 59 Barb. 666, § 241.
—— v. Williams, 36 N. Y. 441, § 230.
—— v. Van Alstyne, 3 Keyes, 35, §§ 279, 333; 32 Barb. 131, §§ 279, 322.
Peoria v. Kidder, 26 Ill. 351, § 149.
Peoria R. R. v. Birkett, 62 Ill. 332, §§ 164, 180, 212, 219, 244, 257.
—— v. Bryant, 57 Ill. 473, §§ 161, 185, 314.
—— v. Laurie, 63 Ill. 264, § 161.
—— v. Railroad, 66 Ill. 174, §§ 41, 47, 130.
—— v. Rice, 75 Ill. 329, § 67.
—— v. Schertz, 84 Ill. 135, § 90.
—— v. Warner, 61 Ill. 52, §§ 95, 96.
Perley v. Chandler, 6 Mass. 454, § 56.
—— v. Railroad, 57 N. H. 212, § 216.
Perrine v. Farr, 22 N. J. L. 356, § 27.
Perry v. Sherborn, 11 Cush. 388, §§ 255, 318.
—— v. Webb, 21 La. An. 247, § 29.
—— v. Worcester, 6 Gray, 544, §§ 87, 220.
Peters v. Mayor, 15 N. Y. Sup. Ct. 405, § 228.
Peterson v. Fereby, 30 Iowa, 327, § 137.
Pettibone v. Lacrosse R. R., 14 Wis. 443, § 142.
Pettigrew v. Evansville, 25 Wis. 223, § 80.
Pettis v. Providence, 11 R. I. 372, §§ 68, 330.

Pfeifer *v.* Sheboygan R. R., 18 Wis. 155, § 144.
Pfleger (*Re*), L. R. 6 Eq. 426, § 73.
Phifer *v.* Carolina R. R., 72 N. C. 433, § 126.
—— *v.* Cox, 21 Ohio St. 248, § 53.
Philadelphia *v.* Dyer, 41 Pa. 463, §§ 76, 175.
Whart. 25, §§ 200, 202.
—— *v.* Scott, 81 Pa. 80, § 82.
Philadelphia R. R. *v.* Johnson, 2
—— *v.* Philadelphia, 9 Phila. 563, §§ 33, 45.
—— *v.* Trimble, 4 Whart. 47, § 215.
—— *v.* Williams, 54 Pa. 103, §§ 31, 59, 65.
—— *v.* Yeiser, 8 Pa. 366, § 163.
Philadelphia & Trenton R. R., 6 Whart. 275, § 336.
Philips's Trusts (*Re*), L. R. 6 Eq. 250, § 73.
Phillips *v.* Dunkirk R. R., 78 Pa. 177, §§ 51, 202.
—— *v.* Pease, 39 Cal. 582, § 175.
Pick *v.* Rubicon Co., 27 Wis. 433, §§ 298, 306.
Pickert *v.* Ridgefield Park R. R., 25 N. J. Eq. 316, § 76.
Pickford *v.* Lynn, 98 Mass. 491, §§ 104, 268.
Pierce *v.* Somersworth, 10 N. H. 369, § 49.
—— *v.* Worcester R. R., 105 Mass. 199, § 163.
Pierpoint *v.* Harrisville, 9 W. Va. 215, § 90.
Pinchin *v.* London & Blackwall Rail. Co., 5 De G. M. & G. 851, § 80.
Pine Grove *v.* Talcott, 19 Wall. 666, § 14.
Pinkerton *v.* Boston R. R., 109 Mass. 527, §§ 75, 319.
Pinkham *v.* Chelmsford, 109 Mass. 225, §§ 88, 169, 178, 324.
Piper *v.* Connersville Turnpike, 12 Ind. 400, § 92.
—— *v.* Union Pacific R R., 14 Kan. 568, § 118.
Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35, §§ 39, 42, 128, 132.
Pittsburgh *v.* Scott, 1 Pa. St. 309, § 11.
Pittsburgh R. R. *v.* Gilleland, 56 Pa. 445, §§ 216, 220.
—— *v.* Hall, 25 Pa. 336, § 73.
—— *v.* Rose, 74 Pa. 362, §§ 162, 165, 170, 207.
Pitzer *v.* Williams, 2 Rob. (Va.) 241, §§ 94, 97.
Plainfield *v.* Packer, 11 Conn. 576, § 274.
Plant *v.* Long Island R. R., 10 Barb. 26, § 192.
Platt *v.* Bright, 29 N. J. Eq. 128, §§ 65, 74.
Plum *v.* Morris Canal Co., 10 N. J. Eq. 256, § 195.
Plummer *v.* Sturtevant, 32 Me. 325, § 285.
Plymouth *v.* County Commissioners, 16 Gray, 341, § 280.
Plymouth Road, 5 Rawle, 150, § 286.
Plympton *v.* Woburn, 11 Gray, 415, § 180.
Pocopson Road, 16 Pa. 15, § 275.
Point No-Point Road, 2 Serg. & R. 277, § 330.
Polack *v.* Trustees, 48 Cal. 490, §§ 202, 318.
Pollard's Lessee *v.* Hagan, 3 How. 212, § 347.
Pollard *v.* Ferguson, 1 Litt. 196, §§ 228, 241.
—— *v.* Moore, 51 N. H. 188, §§ 309, 312.
Polly *v.* Saratoga R. R., 9 Barb. 449, §§ 36, 97, 98.
Pomeroy *v.* Chicago R. R., 25 Wis. 641, §§ 66, 90.
—— *v.* Milwaukee R. R., 16 Wis. 640, § 204.
Porter *v.* North Missouri R. R., 33 Mo. 128, § 200.
Portland R. R. *v.* Commissioners of York County, 65 Me. 292, § 115.
Post *v.* Logan, 1 N. Y. Leg. Obs. 59, § 69.
Poston *v.* Terry, 5 J. J. Marsh. 220, §§ 77, 275.
Potter *v.* Ames, 43 Cal. 75, §§ 88, 340.
Potts's Appeal, 15 Pa. 414, §§ 119, 241.

Pottstown Gas Co. *v.* Murphy, 39 Pa. 257, § 182.
Poughkeepsie R. R. (*In re*), 63 Barb. 151, § 179.
Powell *v.* Sammons, 31 Ala. 552, § 85.
Powers' Appeal, 29 Mich. 504, §§ 11, 275.
Powers *v.* Armstrong, 19 Ga. 427, § 131.
—— *v.* Bears, 12 Wis. 213, §§ 15, 85, 126, 130.
—— *v.* Bergen, 6 N. Y. 358, § 25.
—— *v.* Hurmert, 51 Mo. 136, § 332.
Prather *v.* Ellison, 10 Ohio, 396, § 53.
—— *v.* Jeffersonville R. R., 52 Ind. 16, § 58.
Presbrey *v.* Old Colony R. R., 103 Mass. 1, §§ 166, 167, 170, 213.
President *v.* Givens, 17 Ill. 255, § 161.
President, etc., of Brooklyn *v.* Patchen, 8 Wend. 47, § 48.
Preston *v.* Dubuque R. R., 11 Iowa, 15, § 210.
Pritchard *v.* Atkinson, 3 N. H. 335, § 270.
Proprietors of Locks *v.* Lowell, 7 Gray, 223, §§ 40, 46.
—— *v.* Nashua R. R., 104 Mass. 1, § 57; 10 Cush. 385, §§ 75, 182, 183, 185, 186, 191, 193, 220.
Prospect Park R. R. (Matter of), 67 N. Y. 371, §§ 58, 108; 15 N. Y. Sup. Ct. 30, § 134.
Prosser *v.* Wapello County, 18 Iowa, 327, §§ 35, 165.
Protzman *v.* Indianapolis R. R., 9 Ind. 467, §§ 59, 206.
Proud *v.* Bates, 34 L. J. (Ch.) 406, § 52.
Provolt *v.* Chicago R. R., 57 Mo. 256, §§ 131, 140, 141.
Public Highway (Matter of), 22 N. J. L. 293, § 125.
Pulling *v.* London, Chatham, etc., Rail. Co., 4 N. R. 45, 386; 33 L. J. (Ch.) 505, § 120.
Pumpelly *v.* Green Bay Co., 13 Wall. 166, §§ 30, 80.
Purdy *v.* Martin, 31 Mich. 455, § 101.
Pusey's Appeal, 33 Pa. 67, § 91.
Pusey *v.* Wright, 31 Pa. 387, § 113.
Putnam *v.* Douglas County, 6 Oreg. 328, §§ 151, 159.

Quayles *v.* Missouri R. R., 63 Mo. 465, § 230.
Quimby *v.* Vermont Central R. R., 23 Vt. 387, §§ 49, 212.
Quincy R. R. *v.* Kellogg, 54 Mo. 334, §§ 115, 261.
—— *v.* Ridge, 57 Mo. 599, §§ 152, 248.
—— *v.* Taylor, 43 Mo. 35, § 100.

Radcliff's Executors *v.* Mayor of Brooklyn, 4 N. Y. 195, § 195.
Rader *v.* Township of Union, 39 N. J. L. 509, § 48.
Railroad Co. *v.* Boyer, 18 Pa. 497, § 73.
—— *v.* Bucher, 7 Watts, 33, § 78.
—— *v.* Chappell, Rice. 383, § 14.
—— *v.* Gesner, 20 Pa. 240, § 175.
—— *v.* Gilson, 8 Watts, 243, § 152.
—— *v.* Halstead, 7 W. Va. 301, §§ 112, 135.
—— *v.* Leavenworth, 1 Dill. 393, § 202.
—— *v.* Schurmeir, 7 Wall. 272, §§ 32, 79.
—— *v.* Tyree, 7 W. Va. 693, §§ 152, 153, 158.
Raleigh R. R. *v.* Davis, 2 Dev. & B. 451, §§ 1, 14, 50, 91, 124.
—— *v.* Wicker, 74 N. C. 220, §§ 158, 162, 166, 189, 193, 212.
Ramsden *v.* Manchester Rail. Co, 12 Jur. 293, § 30.
Rand *v.* Newton, 6 Allen, 38, § 169.
Ranken *v.* East and West India Docks Rail. Co., 12 Beav. 298, § 74.
Raphael *v.* Thames Valley Rail. Co., 36 L. J. (Ch.) 209; 2 Ch. App. 147, § 113.
Ray *v.* Atchison R. R., 4 Neb. 439, § 130.
Read *v.* Leeds, 19 Conn. 182, § 56.
—— *v.* Victoria Rail. Co., 1 N. R. 446; 32 L. J. (Ex.) 167, § 160.
Readington *v.* Dilley, 24 N. J. L. 209, §§ 86, 166, 249, 251, 252.
Reckner *v.* Warner, 22 Ohio St. 275, §§ 91, 340.

Red River Bridge v. Clarksville, 1 Sneed, 176, § 42.
Reddall v. Bryan, 14 Md. 444, § 347.
Reddin v. Metropolitan Board of Works, 31 L. J. (Ch.) 660, §§ 120, 121.
Reed v. Hanover Branch R. R., 105 Mass. 303, §§ 65, 75, 175, 248.
—— v. Louisville Bridge, 8 Bush, 69, § 59.
Rees v. Chicago, 38 Ill. 322, § 329.
Reese v. Addams, 16 Serg. & R. 40, § 76.
Reeves v. Wood Co., 8 Ohio St. 333, § 355.
Regent's Canal Co. v. Ware, 26 L. J. (Ch.) 566, § 334.
Regina v. Berkley, 1 Keny. 99, § 333.
—— v. Board of Health of Halifax, 14 L. T. (N. S.) 447, § 333.
—— v. Brown, 36 L. J. (Q. B.) 322, § 178.
—— v. Bristol Rail. Co., 2 Eng. Rail. Cas. 99, §§ 90, 220.
—— v. Commissioners of Rochdale Improvement Act, 2 Jur. N. S. (Q. B.) 861, § 311.
—— v. Eastern Counties Rail. Co., 2 Q. B. 347, § 199.
—— v. London Rail. Co., 3 El. & Bl. 443, § 160.
—— v. Metropolitan Board, L. R. 4 Q. B. 358, § 206.
—— v. North Midland Rail. Co., 2 Eng. Rail. Cas. 1, § 81.
—— v. North Union Rail. Co., 1 Eng. Rail. Cas. 729, § 189.
—— v. Rynd, 16 L. R. C. L., 29, §§ 79, 182.
—— v. Sheriff, 3 Eng. Rail. Cas. 396, § 121.
—— v. Sheriff of Middlesex, 5 Q. B. 865; 8 Q. B. 744, § 331.
—— v. Southampton Rail. Co., 10 Ad. & E. 3, § 68.
—— v. Waterford Rail. Co., 13 L. L. R. 272, §§ 106, 338.
—— v. Wilts & Berks Canal, 8 Dowl. 628, § 331.
Reitenbaugh v. Chester R. R., 21 Pa. 100, §§ 107, 246.
Remy v. Municipality, 15 La. An. 657, §§ 248, 253, 254.
Rensselaer R. R. (Matter of), 4 Paige, 553, § 212.
Rensselaer R. R. v. Davis, 43 N. Y. 137, §§ 58, 59; 55 N. Y. 145, § 311.
Renthorp v. Bourg, 4 Mart. (o. s.) 97, § 348.
Reock v. Newark, 33 N. J. L. 129, §§ 195, 197.
Reserve Township Road, 80 Pa. 165, § 280.
Respublica v. Sparhawk, 1 Dall. 333, § 8.
Revere v. Boston, 14 Gray, 218, § 340.
Rex v. Bristol Dock Co., 12 East, 429, § 79.
—— v. Hungerford Market Co., 5 Ad. & E. 668, § 184.
—— v. Leeds & Selby Rail. Co., 8 Ad. & E. 688, § 217.
—— v. Trustees of Roads, 5 Ad. & E. 563, § 267.
Rexford v. Knight, 11 N. Y. 303, §§ 50, 340.
Reynolds v. Reynolds, 15 Conn. 83, § 26.
—— v. Speers, 1 Stew. 34. § 80.
Rhinebeck R. R. (Matter of), 15 N. Y. Sup. Ct. 84, §§ 312, 318; 67 N. Y. 242, § 312.
Rice v. Alley, 1 Sneed, 51, § 26.
—— v. Parkman, 16 Mass. 326, § 9.
—— v. Turnpike Co., 7 Dana, 81, § 115.
Rich v. Chicago, 59 Ill. 286, § 85.
Richards v. Des Moines R. R., 18 Iowa, 259, § 143.
Richardson v. Monson, 23 Conn. 94, § 9.
Richmond R. R. v. Louisa R. R., 13 How. 71, §§ 39, 42, 45.
—— v. Wicker, 13 Gratt. 375, § 120.
Richmond Turnpike v. Rogers, 1 Duv. 135, §§ 38, 39, 166.
Rickets v. Metropolitan Rail. Co., 34 L. J. (Q. B.) 257, § 162; L. R. 2 H. L. 175, § 192.
Ridge St. (*In re*), 29 Pa. 531, § 195.
Ridge Turnpike Co. v. Stoever, 6 Watts & S. 378, § 55.

Rider *v.* Striker, 63 N. Y. 136, §§ 124, 173, 223, 341.
Riker *v.* Mayor, 3 Daly, 174, § 112.
Ring *v.* Mississippi Bridge, 57 Mo. 496, § 130.
Rio Grande R. R. *v.* Brownsville, 45 Texas, 88, §§ 111, 115, 200.
Rippe *v.* Chicago R. R., 22 Minn. 44, § 136; 23 Minn. 18, §§ 79, 161, 180.
Rising Sun Turnpike *v.* Hamilton, 50 Ind. 580, § 280.
Riverside Park, in Application of Commissioners of Central Park, 61 Barb. 40, § 51.
Road Commissioners *v.* Fickinger, 51 Pa. 48, § 333.
Road in Chartiers, 34 Pa. 413, § 252.
Road in Lower Merion, 58 Pa. 66, § 278.
Robb *v.* Maysville Turnpike, 3 Metc. (Ky.) 117, § 168.
Robbins *v.* Borman, 1 Pick. 122, § 56.
—— *v.* Milwaukee R. R., 6 Wis. 636, §§ 151, 161, 166, 167.
Roberts *v.* Williams, 15 Ark. 48, §§ 27, 66, 77; 13 Ark. 355, §§ 229, 240.
Robinson *v.* Logan, 31 Ohio St. 466, § 283.
—— Mathwick, 5 Neb. 252, §§ 95, 271.
—— *v.* New York R. R., 27 Barb. 512, § 81.
—— *v.* Robinson, 1 Duv. 162, § 158.
—— *v.* West Pennsylvania R. R., 72 Pa. 316, § 50.
—— *v.* Swope, 12 Ky. 21, § 26.
Rochester R. R. *v.* Beckwith, 10 How. Pr. 168, §§ 238, 242, 244.
—— *v.* Budlong, 12 N. Y. Leg. Obs. 46, § 159.
Rochester Water Commissioners (Matter of), 66 N. Y. 413, § 47.
Rockford R. R. *v.* Coppinger, 66 Ill. 510, §§ 92, 325.
—— *v.* McKinley, 64 Ill. 338, §§ 165, 166, 250.
—— *v.* Schunick, 65 Ill. 228, § 110.
Rock Island R. R. *v.* Lynch, 23 Ill. 645, §§ 212, 227.
Rodemacher *v.* Milwaukee R. R., 41 Iowa, 297, §§ 7, 163.
Roehrborn *v.* Schmidt, 16 Wis. 519, § 97.
Rogers, *ex parte*, 7 Cow. 526, § 280.
—— *v.* Bradshaw, 20 Johns. 735, §§ 14, 51, 64, 124.
—— *v.* Kennebec R. R., 35 Me. 319, § 78.
—— *v.* St. Charles, 54 Mo. 229, § 335; 3 Mo. App. 41, §§ 107, 311, 315.
Roll *v.* Augusta, 34 Ga. 326, § 195.
Rome *v.* Omberg, 28 Ga. 46, § 195.
Rondout R. R. *v.* Deyo, 5 Lans. 298, §§ 169, 180.
Rondout R. R. *v.* Field, 38 How. Pr. 187, § 246.
Rooker *v.* Perkins, 14 Wis. 79, § 295.
Root's Case, 77 Pa. 276, § 149.
Rosa *v.* Missouri R. R., 18 Kan. 124, § 350.
Ross *v.* Adams, 28 N. J. L. 160, § 76.
—— *v.* Chicago R. R., 77 Ill. 127, § 118.
—— *v.* Clinton, 46 Iowa 606, §§ 189, 196.
—— *v.* Elizabethtown R. R., 20 N. J. L. 230, §§ 65, 76; 2 N. J. Eq. 422, §§ 78, 141.
Rossignac St., 4 Rob. (La.) 357, §§ 241, 312.
Rossiter *v.* Russell, 18 N. H. 78, § 142.
Rounds *v.* Mumford, 2 R. I. 154, § 195.
Rowe *v.* Addison, 34 N. H. 306, § 64.
—— *v.* Granite Bridge Co., 21 Pick. 344, §§ 81, 220.
Rubottom *v.* McClure, 4 Blackf. 505, § 130.
Rudisill *v.* The State, 40 Ind. 485, §§ 126, 145.
Rugby Charity *v.* Merriweather, 11 East, 375, *n.*, § 279.
Rundle *v.* Delaware Canal Co., 14 How. 80, § 38.
Ruppert *v.* C. O. & St. Joe R. R., 43 Iowa, 490, §§ 78, 262.
Rush *v.* McDermott, 50 Cal. 471, § 67.
Russell *v.* Mayor of New York, 2 Denio, 461, § 5.
Ryan *v.* Hoffman, 26 Ohio St. 109, § 145.

Ryers (*In re*), — N. Y. —, § 354; 10 Hun, 98, § 354.
Ryerson *v.* Brown, 35 Mich. 333, § 15.

Sabin *v.* Vermont Central R. R., 25 Vt. 363, §§ 186, 216, 220, 222.
Sabine *v.* Johnson, 35 Wis. 185, § 306.
Sacramento R. R. *v.* Moffatt, 7 Cal. 577, § 77.
Sadd *v.* Maldon Rail. Co., 20 L. J. (Exch.) 102, § 58.
Sadler *v.* Langham, 34 Ala. 311, §§ 10, 12, 15, 26, 27, 287.
Sage *v.* Laurain, 19 Mich. 137, §§ 64, 234.
Salem Turnpike *v.* Lyme, 18 Conn. 451, §§ 42, 43.
Salt Co. *v.* Brown, 7 W. Va. 191, § 28.
Saltpeter Case, 12 Coke, 13, § 4.
Sampson *v.* Bradford, 6 Cush. 303, § 307.
Sanborn *v.* Belden, 51 Cal. 266, §§ 126, 136.
Sanderson *v.* Haverstick, 8 Pa. 294, § 53.
Sandford *v.* Martin, 31 Iowa, 67, § 48.
Sandy Lick Road, 51 Pa. 94, § 27.
San Francisco *v.* Scott, 4 Cal. 114, § 85.
—— *v.* Water-Works, 48 Cal. 493, § 51.
San Francisco R. R. *v.* Caldwell, 31 Cal. 367, §§ 149, 159.
—— *v.* Mahoney, 29 Cal. 112, § 160.
San Francisco Water Co. *v.* Alameda Water Co., 36 Cal. 639, § 47.
San Mateo Water-Works *v.* Sharpstein, 50 Cal. 284, § 136.
Sargent *v.* Machias, 65 Me. 591, § 66.
Sater *v.* Burlington R. R., 1 Iowa, 336, §§ 159, 165.
Satterfield, Admrx., *v.* Crow, 8 B. Mon. 553, § 67.
Savannah R. R. *v.* Savannah, 45 Ga. 602, §§ 202, 203, 205.
Sawyer *v.* Keene, 47 N. H. 173, §§ 197, 216.
—— *v.* Meyer, 45 Iowa, 152, § 318.
Schattner *v.* Kansas City, 53 Mo. 162, § 195.
Schermeely *v.* Stillwater R. R., 16 Minn. 503, § 113.
Schmidt *v.* Densmore, 42 Mo. 225, § 60.
Schuchardt *v.* New York, 53 N. Y. 202, § 54.
Schuler *v.* Railroad, 3 Whart. 555, § 188.
Schumacher *v.* St. Louis, 3 Mo. App. 297, § 197.
Schuylkill Co. *v.* Decker, 2 Watts, 343, § 66.
—— *v.* Farr, 4 Watts & S. 362, §§ 159, 174.
—— *v.* Freedley, 6 Whart. 109, § 191.
—— *v.* Kittera, 2 Rawle, 438, § 338.
—— *v.* Thoburn, 7 Serg. & R. 411, §§ 74, 159, 173, 174.
Schurmeier *v.* St. Paul R. R., 10 Minn. 82, § 204.
Scott *v.* St. Paul R. R., 21 Minn. 322, §§ 166, 175.
Scudder *v.* Trenton Falls Co., 1 N. J. Eq. 694, §§ 15, 61, 91, 141.
Searle *v.* Lackawanna R. R., 33 Pa. 57, § 168.
Secombe *v.* Milwaukee R. R., 23 Wall. 108, §§ 11, 14, 90, 323; 2 Dill. 469, § 98.
Sedgwick *v.* Watford Rail. Co., 36 L. J. (Ch.) 379, § 144.
Seifert *v.* Brooks, 34 Wis. 443, §§ 95, 328.
Selden *v.* Delaware Canal Co., 24 Barb. 362, §§ 30, 37; 29 N. Y. 634, § 59.
Selma R. R. *v.* Camp, 45 Ga. 180, §§ 161, 191.
—— *v.* Keith, 53 Ga. 178, §§ 159, 170, 173, 220.
—— *v.* Red Wine, 51 Ga. 470, § 166.
Senaker *v.* Justices, 4 Sneed, 116, § 338.
Seneca Rd. Co. *v.* Auburn R. R., 5 Hill, 170, § 32.
Senior *v.* Metropolitan Rail. Co., 32 L. J. (Exch.) 225, § 158.
Seventeenth St. (Matter of), 1 Wend. 262, § 225.
Severin *v.* Cole, 38 Iowa, 463, § 74.

Sexton *v.* New Bridgewater, 116 Mass. 200, §§ 153, 168, 169.
Shackleford *v.* Coffey, 4 J. J. Marsh. 40, § 291.
Shamleffer *v.* Peerless Mill Co., 18 Kan. 24, § 79.
Sharp *v.* Johnson, 4 Hill, 92, §§ 103, 267.
Shattuck *v.* Stoneham R. R., 6 Allen, 115, §§ 168, 170:
—— *v.* Waterville, 27 Vt. 600, § 322.
—— *v.* Wilton R. R., 28 N. H. 269, § 175.
Shaver *v.* Starrett, 4 Ohio St. 494, §§ 12, 27.
Shaw *v.* Charlestown, 2 Gray, 107, § 157; 8 Allen, 538, § 319.
—— *v.* Wells, 5 Cush. 537, § 302.
Shawneetown *v.* Mason, 82 Ill. 337, §§ 153, 190, 195.
Shea *v.* Potrero R. R., 44 Cal. 414, § 205.
Shearer *v.* Commissioners, 13 Kan. 145, § 345.
Shelton *v.* Derby, 27 Conn. 414, §§ 65, 67, 78.
Shenango R. R. *v.* Braham, 79 Pa. 447, §§ 159, 178.
Shepardson *v.* Milwaukee R. R., 6 Wis. 605, §§ 89, 126.
Sherman *v.* Buick, 32 Cal. 241, §§ 12, 27.
—— *v.* Milwaukee R. R., 40 Wis. 645, §§ 89, 204.
Sherwood *v.* St. Paul R. R., 21 Minn. 122, §§ 113, 162, 167, 174, 316.
Shinkle *v.* Magill, 58 Ill. 422, §§ 101, 284, 344.
Shipley *v.* Baltimore R. R., 34 Md. 336, § 158.
Shoenberger *v.* Mulhollan, 8 Pa. 134, § 28.
Shough, *ex parte*, 16 N. J. L. 264, § 230.
Shrunk *v.* Schuylkill Co., 14 Serg. & R. 71, § 80.
Shute *v.* Chicago R. R., 26 Ill. 486, § 128.
—— *v.* Decker, 51 Ind. 241, § 278.
Sidener *v.* Essex, 22 Ind. 201, § 159.
Sidener *v.* Norristown Turnpike, 28 Ind. 623, § 90.
Sigafoos *v.* Talbot, 25 Iowa, 214, § 91.
Simickson *v.* Johnson, 17 N. J. L. 129, §§ 1, 124, 134.
Simmons *v.* Camden, 26 Ark. 276, § 195.
—— *v.* St. Paul R. R., 18 Minn. 184, §§ 92, 159, 165, 166, 168.
Singleton *v.* Commissioners, 2 Nott & M. 526, § 27.
Sixth Avenue R. R. *v.* Kerr, 45 Barb. 188, §§ 39, 44.
Skinner *v.* Hartford Bridge Co., 29 Conn. 523, § 195.
—— *v.* Lake View Avenue Co., 57 Ill. 151, §§ 95, 96, 101.
Slatten *v.* Des Moines R. R., 29 Iowa, 148, §§ 199, 200.
Sleight *v.* Kingston, 18 N. Y. Sup. Ct. 594, §§ 189, 190.
Small *v.* Pennell, 31 Me. 267, § 51.
Smart *v.* Portsmouth R. R., 20 N. H. 233, § 140.
Smedley *v.* Erwin, 51 Pa. 445, § 11.
Smith *v.* Alexander, 24 Ind. 454, §§ 97, 328.
—— *v.* Applegate, 23 N. J. L. 352, § 24.
—— *v.* Boston, 7 Cush. 254, § 318; 1 Gray, 72, § 330.
—— *v.* Chicago R. R., 67 Ill. 191, §§ 87, 89, 90, 142.
—— *v.* Connelly, 1 T. B. Mon. 58, § 267.
—— *v.* Conway, 17 N. H. 586, §§ 24, 49, 237.
—— *v.* Duck Pond Ditching Assn., 54 Ind. 235, § 356.
—— *v.* Ferris, 13 N. Y. Sup. Ct. 553, §§ 66, 111.
—— *v.* Helmer, 7 Barb. 416, § 124.
—— *v.* Leavenworth, 15 Kan. 81, § 51.
—— *v.* Martin, 2 Wms. Saund. 394, § 120.
—— *v.* Olmstead, 5 Blackf. 87, § 291.
—— *v.* Rome, 19 Ga. 89, § 52.
—— *v.* Taylor, 34 Texas, 589, § 322.
—— *v.* Washington, 20 How. 135, § 195.

Snell *v.* Bridgewater Co., 24 Pick. 296, § 299.
Snow *v.* Boston R. R., 65 Me. 230, §§ 166, 168, 254.
Snyder *v.* Pennsylvania R. R., 55 Pa. 340, § 200.
—— *v.* Plass, 28 N. Y. 465, § 121.
—— *v.* Rockport, 6 Ind. 237, §§ 195, 197.
—— *v.* Trumpbour, 38 N. Y. 355, §§ 100, 121.
—— *v.* Warford, 11 Mo. 513, § 29.
—— *v.* Western R. R., 25 Wis. 60, §§ 159, 165.
Sohier *v.* Massachusetts General Hospital, 3 Cush. 496, § 9.
Somerville R. R. *v.* Doughty, 21 N. J. L. 442, §§ 118, 139; 22 N. J. L. 495, §§ 163, 166, 168, 173.
Soulard *v.* St. Louis, 36 Mo. 546, §§ 89, 90.
South Carolina R. R., *ex parte*, 2 Rich. L. 484, § 58.
—— *v.* Blake, 9 Rich. L. 228, § 62.
—— *v.* Steiner, 44 Ga. 546, §§ 32, 193, 207, 265, 266.
South Minnesota R. R. *v.* Stoddard, 6 Minn. 150, § 62.
South Seventh St. (Matter of), 48 Barb. 12, §§ 49, 243.
South Side R. R. *v.* Daniel, 20 Gratt. 344, §§ 66, 220.
South Wales Co. *v.* Richards, 6 Eng. Rail. Cas. 197, §§ 166, 333.
South Wales Rail. Co. (*In re*), 14 Beav. 418, § 335.
Southampton Bridge Co. *v.* Southampton, 21 L. J. (Q. B.) 41, § 220.
Southern Boulevard, 3 Abb. Pr. (N. S.) 447, §§ 227, 269.
Southern Pacific R. R. *v.* Raymond, 6 Rep. 708 (Cal.), § 59.
—— *v.* Reed, 41 Cal. 256, §§ 134, 204.
—— *v.* Wilson, 49 Cal. 396, § 263.
Southwark R. R. *v.* Philadelphia, 47 Pa. 314, § 202.
South-Western R. R. *v.* Southern Telegraph Co., 46 Ga. 43, §§ 131, 209.
Sowle *v.* Cosner, 56 Ind. 276, § 324.
Spackman *v.* Great Western Rail. Co., 1 Jur. (N. S.) 790, § 121.
Spangler's Appeal, 64 Pa. 387, §§ 87, 194.
Sparhawk *v.* Walpole, 20 N. H. 317, § 328.
Sparrow *v.* Oxford, Worcester & Wolverhampton R. R., 2 De G. M. & G. 94, §§ 30, 121.
Spencer *v.* Hartford R. R., 10 R. I. 14, § 220.
Spring *v.* Russell, 7 Me. 273, § 87.
Spring Garden St., 4 Rawle, 192, § 235.
Spring Valley Water-Works *v.* San Francisco, 22 Cal. 434, § 160.
Springfield R. R. *v.* Hall, 67 Ill. 99, §§ 84, 93.
Squiers *v.* Neenah, 24 Wis. 588, § 111.
Squire *v.* Somerville, 120 Mass. 579, § 168.
St. Albans *v.* Seymour, 41 Vt. 579, § 67.
St. Anthony Falls Co. *v.* King Bridge Co., 28 Minn. 186, §§ 54, 60.
St. Joseph *v.* Hamilton, 43 Mo. 282, § 311.
St. Joseph R. R. *v.* Callender, 13 Kan. 496, § 143.
—— *v.* Orr, 8 Kan. 419, §§ 166, 170, 172, 180, 326.
St. Louis *v.* Gurno, 12 Mo. 414, §§ 195, 196.
—— *v.* Stern, 3 Mo. App. 48, § 7.
St. Louis R. R. *v.* Almeroth, 62 Mo. 343, § 232.
—— *v.* Blind Institution, 43 Ill. 303, §§ 46, 351.
—— *v.* Brown, 58 Ill. 61, §§ 153, 167.
—— *v.* Capps, 67 Ill. 607, §§ 159, 177, 208.
—— *v.* Haller, 82 Ill. 208, § 170.
—— *v.* Mitchell, 47 Ill. 165, §§ 118, 212, 219.
—— *v.* Mollett, 59 Ill. 235, § 215.
—— *v.* Richardson, 45 Mo. 466, §§ 152, 243.
—— *v.* Teters, 68 Ill. 144, §§ 161, 162, 163, 312.

St. Louis R. R. v. Wilder, 17 Kan. 239, §§ 65, 180, 312.
St. Paul R. R. v. Matthews, 16 Minn. 341, §§ 77, 161.
—— v. Murphy, 19 Minn. 500, §§ 165, 167, 213, 316.
St. Peter v. Denison, 58 N. Y. 416, §§ 60, 186.
Stacey v. Vermont Central R. R., 27 Vt. 39, § 311.
Stackpole v. Healy, 16 Mass. 33, § 53.
Stafford v. Mayor of Albany, 7 Johns. 541, § 312; 6 Johns. 1, § 326.
—— v. Providence, 10 R. I. 567, § 178.
Stainton v. Metropolitan Board of Works, 26 L. J. (Ch.) 300, § 81.
Stamps v. Birmingham Rail. Co., 17 L. J. (Ch.) 431, § 58.
Stanford v. Worn, 27 Cal. 171, § 95.
Stark v. Sioux City R. R., 48 Iowa, 501, §§ 62, 211.
Starr v. Camden R. R., 24 N. J. L. 592, § 32.
—— v. Rochester, 6 Wend. 564, § 312.
State (The) v. Administrator of Public Accounts, 26 La. An. 336, § 317.
—— v. Allen, 8 N. J. L. 301, § 228.
—— v. Anderson, 39 Iowa, 274, § 95.
—— v. Armell, 8 Kan. 288, §§ 58, 222.
—— v. Ayres, 15 N. J. L. 479, § 228.
—— v. Barnes, 18 N. J. L. 268, § 228.
—— v. Bennett, 25 N. J. L. 329, § 77.
—— v. Bergen, 21 N. J. L. 342, §§ 234, 236.
—— v. Blake, 36 N. J. L. 442, § 16.
—— v. Blauvelt, 33 N. J. L. 36, § 77; 34 N. J. L. 211, §§ 268, 333.
—— v. Burnet, 14 N. J. L. 385, § 228.
—— v. Cake, 24 N. J. L. 516, § 268.
—— v. Canterbury, 28 N. H. 195, § 42; 40 N. H. 307, § 231.
—— v. Carragan, 36 N. J. L. 52, § 225.
—— v. Central R. R., 17 Ohio St. 103, § 311.
—— v. Cincinnati R. R., 17 Ohio St. 103, § 313.
—— v. City Council, 12 Rich. L. 702, § 1.
State (The) v. Cooper, 23 N. J. L. 331, § 330.
—— v. Crane, 36 N. J. L. 394, § 227.
—— v. Davis, 13 N. J. L. 10, § 228.
—— v. Dawson, 3 Hill (S. C.), 100, §§ 1, 125.
—— v. Delesdernier, 11 Me. 473, § 227.
—— v. Demarest, 32 N. J. L. 528, § 2.
—— v. Dickson, 3 Mo. App. 464, § 334.
—— v. Digby, 5 Blackf. 543, § 158.
—— v. Easton R. R., 36 N. J. L. 181, §§ 46, 71, 75, 95.
—— v. Elizabeth, 32 N. J. L. 357, § 100.
—— v. Emmons, 24 N. J. L. 45, § 268.
—— v. Evans, 3 Ill. 208, §§ 50, 153, 162.
—— v. Everitt, 23 N. J. L. 378, § 330.
—— v. Fischer, 26 N. J. L. 129, § 73.
—— v. Fon du Lac, 42 Wis. 287, §§ 98, 324.
—— v. Garretson, 23 N. J. L. 398, § 65.
—— v. Glen, 7 Jones L. 321, § 81.
—— v. Graves, 19 Md. 351, §§ 149, 311.
—— v. Green, 15 N. J. L. 88, § 228; 18 N. J. L. 179, §§ 278, 333.
—— v. Hoboken, 35 N. J. L. 205, § 202.
—— v. Hopping, 18 N. J. L. 423, §§ 118, 119.
—— v. Hudson Tunnel Co., 38 N. J. L. 548, §§ 40, 41.
—— v. Hug, 44 Mo. 116, § 311.
—— v. Hulick, 33 N. J. L. 307, §§ 65, 280, 323.
—— v. Hutchinson, 10 N. J. L. 242, § 228.
—— v. Jersey City, 25 N. J. L. 309, §§ 95, 227, 233.
—— v. Justice, 24 N. J. L. 413, §§ 234, 236, 243, 322.
—— v. Keokuk, 9 Iowa, 438, §§ 145, 311.
—— v. Langer, 29 Wis. 68, § 97.
—— v. Laverack, 34 N. J. L. 201, §§ 34, 55.
—— v. Maine, 27 Conn. 641, §§ 14, 34.
—— v. Mansfield, 23 N. J. L. 510, § 59.
—— v. Miller, 23 N. J. L. 383, §§ 117, 234.

State (The) v. Mills, 29 Wis. 322, § 293.
—— v. Mont Clair R. W., 35 N. J. L. 328, § 46.
—— v. Northrop, 18 N. J. L. 271, §§ 228, 278.
—— v. Noyes, 47 Me. 189, §§ 38, 39, 43, 46.
—— v. Oliver, 24 N. J. L. 129, § 77.
—— v. Orange, 32 N. J. L. 49, §§ 67, 95.
—— v. Otoe County, 6 Neb. 129, § 101.
—— v. Prine, 25 Iowa, 231, §§ 95, 98.
—— v. Reed, 38 N. H. 59, § 103.
—— v. Richmond, 26 N. H. 232, §§ 268, 323.
—— v. Rives, 5 Ired. 297, § 50.
—— v. Runyon, 24 N. J. L. 256, § 65.
—— v. Scott, 9 N. J. L. 17, § 229.
—— v. Seymour, 35 N. J. L. 47, §§ 36, 125, 128, 225.
—— v. Shreeve, 15 N. J. L. 57, § 101.
—— v. Shreve, 4 N. J. L. 297, §§ 228, 230.
—— v. Smith, 21 N. J. L. 91, § 333.
—— v. Snedeker, 30 N. J. L. 80, § 318.
—— v. Snow, 3 R. I. 64, § 8.
—— v. Stites, 13 N. J. L. 172, § 24.
—— v. Stout, 33 N. J. L. 42, § 270.
—— v. St. Louis, 62 Mo. 244, § 151.
—— v. Ten Eyck, 18 N. J. L. 373, § 333.
—— v. Trenton, 36 N. J. L. 79, § 48.
—— v. Troth, 34 N. J. L. 377, § 120.
—— v. Van Buskirk, 21 N. J. L. 86, § 278.
—— v. Van Geison, 15 N. J. L. 339, § 230.
—— v. Wilson, 17 Wis. 687, §§ 145, 251.
—— v. Woodruff, 36 N. J. L. 204, §§ 268, 278, 333.
—— v. Woodward, 9 N. J. L. 21, § 268.
Steele v. Midland Rail. Co., L. R. 1 Ch. App. 275, § 120.
—— v. West Lock Nav. Co., 2 Johns. 283, § 216.
Stein v. Burden, 24 Ala. 130, §§ 48, 79, 89, 165.
Stetson v. Bangor, 60 Me. 313, § 81.
—— v. Chicago R. R., 75 Ill. 74, §§ 194, 203.
Steuart v. Mayor, 7 Md. 500, §§ 36, 91.
Stevens v. Duck River Co., 1 Sneed, 237, §§ 254, 255, 312, 313.
—— v. Middlesex Canal, 12 Mass. 466, §§ 64, 87, 88, 124.
—— v. Paterson R. R., 34 N. J. L. 532, § 82.
Stewart v. Board of Police, 25 Miss. 479, § 94.
—— v. Hartman, 46 Ind. 331, §§ 26, 29, 279.
—— v. Polk County, 30 Iowa, 9, § 14.
—— v. Raymond R. R., 7 Smed. & M. 568, § 131.
—— v. Wallis, 30 Barb. 344, § 230.
Stiles v. Middlesex, 8 Vt. 436, § 311.
Still, *ex parte*, 4 Barn. & Adol. 592, § 68.
Stinson v. Dunbarton, 46 N. H. 385, § 274.
Stockett v. Nicholson, Walk. (Miss.) 75, § 84.
Stockport, etc., Rail. Co. (*In re*), 33 L. J. (Q. B.) 251, § 163.
Stockton R. R. v. Galgiani, 49 Cal. 139, § 168.
—— v. Stockton, 41 Cal. 147, §§ 10, 13, 14.
Stodghill v. Chicago R. R., 43 Iowa, 26, § 216.
Stone v. Boston, 2 Metc. 220, § 95.
—— v. Commercial Rail. Co., 9 Sim. 621, § 121.
—— v. Fairbury R. R., 68 Ill. 394, §§ 193, 199, 203.
—— v. Mayor of New York, 25 Wend. 157, § 5.
Storer v. Hobbs, 52 Me. 144, § 106.
Story St. (*In re*), — Pa. —, § 225.
Stourbridge Canal Co. v. Earl of Dudley, 30 L. J. (Q. B.) 108, § 52.
Stowell v. Flagg, 11 Mass. 364, §§ 292, 297.
Strang v. Beloit R. R., 16 Wis. 635, §§ 117, 227.

Street R. W. *v.* Cumminsville, 14 Ohio St. 524, §§ 205, 206, 207.
Striker *v.* Kelly, 7 Hill, 9, § 149.
Strohecker *v.* Alabama R. R., 42 Ga. 509, § 49.
Strong *v.* Brooklyn, 68 N. Y. 1, § 57.
Struthers *v.* Dunkirk R. R., 7 Cent. L. J. (Pa.) 218, § 200.
Stuber's Road, 28 Pa. 199, § 317.
Sturtevant *v.* Plymouth, 12 Metc. 7, § 111.
Suffield *v.* Hathaway, 44 Conn. 521, § 56.
Sumner *v.* Commissioners, 37 Me. 112, §§ 115, 277.
Sunbury R. R. *v.* Hummell, 27 Pa. 99, § 168.
Supervisors *v.* Gorrell, 20 Gratt. 484, §§ 62, 268, 269.
Surocco *v.* Geary, 3 Cal. 69, § 4.
Susquehanna Canal Co. *v.* Wright, 9 Watts & S. 9, § 38.
Sutton's Heirs *v.* Louisville, 5 Dana, 28, §§ 135, 149, 151, 158.
Swan *v.* Middlesex, 101 Mass. 173, §§ 165, 168.
—— *v.* Williams, 2 Mich. 427, § 14.
Symonds *v.* Cincinnati, 14 Ohio, 147, § 149.
Syracuse R. R. (Matter of), 11 N. Y. Sup. Ct. 311, § 311.

Talbot *v.* Hudson, 16 Gray, 417, §§ 12, 16, 22, 45, 126.
Tamm *v.* Kellogg, 49 Mo. 118, § 146.
Tasker *v.* Small, 7 L. J. (Ch.) 19, § 65.
Tate *v.* Ohio R. R., 7 Ind. 479, §§ 200, 206.
Taylor (*Re*), 6 Eng. Rail. Cas. 741, § 75.
—— *v.* Armstrong, 24 Ark. 102, §§ 51, 56.
—— *v.* Cedar Rapids R. R., 25 Iowa, 371, § 118.
—— *v.* Commissioners of Worcester, 105 Mass. 225, § 227.
—— *v.* Hampden, 18 Pick. 309, §§ 67, 98.
—— *v.* Nashville R. R., 6 Coldw. 646, § 8.
Taylor *v.* New York R. R., 38 N. J. L. 28, § 210.
—— *v.* Plymouth, 8 Metc. 462, §§ 4, 5.
—— *v.* Porter, 4 Hill, 140, § 26.
—— *v.* St. Louis, 14 Mo. 20, § 195.
Teese, *ex parte*, 4 Pa. 69, § 344.
Teick *v.* Commissioners, 11 Minn. 292, § 116.
Telegraph Co. *v.* Rich, 19 Kan. 517, §§ 59, 209.
Ten Brooke *v.* Jahke, 77 Pa. 392, § 66.
Ten Eyck *v.* Delaware Canal, 18 N. J. L. 200, § 80.
Tennessee R. R. *v.* Love, 3 Head, 63, § 65.
Terre Haute *v.* Turner, 36 Ind. 522, § 197.
Terre Haute R. R. *v.* McKinley, 33 Ind. 274, § 220.
Terry *v.* Hartford, 39 Conn. 286, § 152.
Thacher *v.* Dartmouth Bridge Co., 18 Pick. 501, §§ 48, 128.
Thayer *v.* County Commissioners, 10 Cush. 151, § 324.
Thetford *v.* Kilburn, 36 Vt. 179, § 264.
Thompson *v.* Androscoggin Improvement Co., 54 N. H. 545, §§ 80, 184, 191.
—— *v.* Conway, 53 N. H. 622, §§ 234, 246.
—— *v.* Grand Gulf R. R., 3 How. (Miss.) 240, § 181.
Thorn *v.* Sweeney, 12 Nev. 251, §§ 18, 90.
Thorndike *v.* Norfolk, 117 Mass. 566, § 325.
Thorpe *v.* Rutland R. R., 27 Vt. 140, §§ 7, 43.
Thurston *v.* Hancock, 12 Mass. 220, § 181.
—— *v.* Portland, 63 Me. 149, § 160.
—— *v.* St. Joseph, 51 Mo. 510, § 196.
Tide-Water Co. *v.* Archer, 9 Gill & J. 479, §§ 60, 76, 159, 253.
—— *v.* Coster, 18 N. J. Eq. 54, 518, §§ 16, 149.
Tingley *v.* Providence, 8 R. I. 493, §§ 152, 165; 9 R. I. 338, § 97.
Tinicum Co. *v.* Carter, 61 Pa. 21, § 80.

Tinsman v. Belvidere R. R., 26 N. J. L. 148, §§ 61, 81.
Tipton v. Miller, 3 Yerg. 428, §§ 20, 248.
Titusville R. R. v. Warren R. R. — Pa. —, § 47.
Todd v. Austin, 34 Conn. 78, §§ 1, 23, 108.
—— v. Kankakee R. R., 78 Ill. 530, §§ 153, 158.
—— v. Todd, 10 N. Y. Sup. Ct. 298, § 230.
Todemier v. Aspinwall, 43 Ill. 401, §§ 71, 115.
Toledo R. R. v. Daniels, 16 Ohio St. 390, § 58.
—— v. Darst, 61 Ill. 231, § 143.
—— v. Green, 67 Ill. 199, § 208.
Tomlin v. Dubuque R. R., 32 Iowa, 106, § 82.
Tomlinson v. Wallace, 16 Wis. 224, § 343.
Tompkins v. Hodgson, 9 N. Y. Sup. Ct. 146, § 55.
Toney v. Johnson, 26 Ind. 382, §§ 87, 291.
Tonica R. R. v. Unsicker, 22 Ill. 221, §§ 152, 166, 212.
Towamencin Road, 10 Pa. 195, § 241.
Tower v. Pitstick, 55 Ill. 115, § 117.
Towle v. Eastern R. R., 17 N. H. 519, § 199.
Town v. Faulkner, 56 N. H. 255, § 303.
Town of Old Town v. Dooley, 81 Ill. 255, §§ 51, 56.
Towns v. Stoddard, 30 N. H. 28, §§ 227, 228.
Townsend (Matter of), 39 N. Y. 171, §§ 60, 61, 93, 352.
Townsend v. Hoyle, 20 Conn. 1, § 24.
Township Board v. Hackman, 48 Mo. 243, § 17.
Trabue v. Macklin, 4 B. Mon. 407, § 288.
Treat v. Middletown, 8 Conn. 243, §§ 145, 272.
Trenton Water Co. v. Chambers, 13 N. J. Eq. 199, § 216.
Trinity College v. Hartford, 32 Conn. 452, §§ 108, 149, 151.
Tripp v. Commissioners, 2 Allen, 556, §§ 251, 255.
Trombley v. Humphrey, 23 Mich. 471, § 347.
Troy v. Cheshire R. R., 23 N. H. 83, §§ 32, 54, 88.
Troy R. R. v. Kane, 16 N. Y. Sup. Ct. 506, § 154.
—— v. Lee, 13 Barb. 169, § 243.
—— v. Northern Turnpike Co., 16 Barb. 100, § 237.
—— v. Potter, 42 Vt. 265, §§ 110, 141, 208.
True v. Freeman, 64 Me. 578, §§ 328, 342.
Trustees v. Auburn R. R., 3 Hill, 567, § 32.
—— v. Davenport, 7 Iowa, 213, § 137.
—— v. Dennett, 9 N. Y. Sup. Ct. 669, § 83.
—— v. Salmond, 11 Me. 109, §§ 41, 99.
—— v. Worcester, 1 Metc. 437, § 77.
Trustees of Emmanuel Hospital v. Metropolitan Rail. Co., 19 L. T. (N. S.) 692, § 227.
Tucker (Petition of), 27 N. H. 405, § 333.
—— v. Campbell, 36 Me. 346, § 262.
—— v. Eldred, 6 R. I. 404, §§ 51, 52, 53.
—— v. Erie R. R., 27 Pa. 281, §§ 108, 216.
—— v. Tower, 9 Pick. 109, §§ 53, 55.
Tuckahoe Canal Co. v. Tuckahoe R. R., 11 Leigh, 42, §§ 39, 42, 46.
Tufts v. Charlestown, 4 Gray, 537, §§ 74, 168.
Tunbridge v. Tarbell, 19 Vt. 453, § 92.
Tuohey v. Great Southern Rail. Co., 10 I. R. C. L. 98, § 207.
Turner v. Dartmouth, 13 Allen, 291, § 189.
—— v. Sheffield Rail. Co., 3 Eng. Rail. Cas. 222, § 220; 10 Mee. & W. 425, § 220.
—— v. Williams, 10 Wend. 140, §§ 69, 70.
Turnpike Co. v. The State, 3 Wall. 210, § 39.

Turnpike Road *v.* Brosi, 22 Pa. 29, §§ 66, 68.
Tyler *v.* Beacher, 44 Vt. 648, §§ 10, 11, 15, 287.
—— *v.* St. Louis, 56 Mo. 60, § 110.

Unangst's Appeal, 55 Pa. 128, § 113.
Underwood *v.* North Wayne Co., 41 Me. 291, § 291.
Union Canal Co. *v.* Stump, — Pa. —, § 303.
Union R. W. *v.* Continental R. W., Phila. (C. P.), § 44.
United States *v.* Ames, 1 Woodb. & M. 76, § 350.
—— *v.* Block, 121, 3 Biss. 208, §§ 74, 347.
—— *v.* Chicago, 7 How. 185, § 350.
—— *v.* Fox, 94 U. S. 315, § 9.
—— *v.* Harris, 1 Sumn. 21, § 49.
—— *v.* Illinois Central R. R., 2 Biss. 174, § 37.
—— *v.* Railroad Bridge, 6 McLean, 517, § 350.
—— *v.* Reed, 56 Mo. 565, §§ 107, 347.
—— *v.* Tract of Land, 47 Cal. 515, § 148.
Updike *v.* Wright, 81 Ill. 49, § 360.
Upham *v.* Worcester, 113 Mass. 97, § 150.
Upton *v.* South Reading R. R., 8 Cush. 600, § 170.
Utica R. R. (Matter of), 56 Barb. 456, §§ 110, 159, 163, 166.

Vail *v.* Morris R. R., 21 N. J. L. 189, §§ 99, 107, 115, 122.
Van Auken *v.* Commissioners, 27 Mich. 414, § 101.
Vanblaricum *v.* The State, 7 Blackf. 209, § 174.
Vandegrift *v.* Delaware R. R., 2 Houst. 287, § 212.
Van Horne's Lessee *v.* Dorrance, 2 Dall. 304, §§ 22, 25, 85, 91, 135.
Van Riper *v.* Essex Public Road, 38 N. J. L. 23, § 281.
Van Schoick *v.* Delaware Canal, 20 N. J. L. 249, §§ 216, 219.
Van Steenbergh *v.* Bigelow, 3 Wend. 42, §§ 230, 243, 328.
Van Valkenburgh *v.* Milwaukee, 48 Wis. 574, § 313.
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Van Wickle *v.* Camden R. R., 14 N. J. L. 162, §§ 101, 237.
Varick *v.* Smith, 5 Paige, 137, § 28.
Vassalborough (Inhabitants of), 19 Me. 338, § 333.
Vaugh *v.* Wetherell, 116 Mass. 188, § 307.
Vaughan *v.* Taff Valley Rail. Co., 29 L. J. (Exch.) 247, § 168.
Vaughn *v.* Stuzaker, 16 Ind. 338, § 51.
Vawter *v.* Gilliland, 55 Ind. 278. § 77.
Vermont R. R. *v.* Baxter, 22 Vt. 365, §§ 60, 128, 222.
—— *v.* Franklin, 10 Cush. 12, § 214.
Vicksburg R. R. *v.* Calderwood, 15 La. An. 481, §§ 153, 158, 338.
Viele *v.* Troy R. R., 20 N. Y. 184, § 113.
Vilas *v.* Milwaukee R. R., 15 Wis. 233, § 142.
Viner *v.* Hoylake Rail. Co., 17 W. R. 92, § 144.
Virginia R. R. *v.* Elliott, 5 Nev. 358, §§ 62, 168, 243.
—— *v.* Henry, 8 Nev. 165, §§ 135, 159, 166, 172, 237, 239, 243.
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Waddell *v.* Mayor of New York, 8 Barb. 95, § 195.
Waddy *v.* Johnson, 5 Ired. 333, § 292.
Wadhams *v.* Lackawanna R. R., 42 Pa. 303, §§ 109, 136.
Wager *v.* Troy Union R. R., 25 N. Y. 526, §§ 32, 204, 205.
Wagner *v.* Gage County, 3 Neb. 237, § 158.

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Walker v. Board of Public Works, 16 Ohio, 540, § 81.
—— v. Boston, 8 Cush. 279, § 168.
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—— v. Mad River Co., 8 Ohio, 38, § 62.
—— v. Old Colony R. R., 103 Mass. 10, §§ 167, 189.
—— v. Oxford Woollen Co., 10 Metc. 203, § 307.
Wall St. (Matter of), 17 Barb. 617, §§ 224, 225.
Wallace v. Karlenowefski, 19 Barb. 118, §§ 1, 125.
Walters v. Houck, 7 Iowa, 72, § 259.
Walther v. Warner, 25 Mo. 277, §§ 86, 126, 131.
Wamesit Power Co. v. Allen, 120 Mass. 352, § 116.
Ward v. Turnpike Co., 6 Ohio St. 15, § 55.
Ware v. County Commissioners, 38 Me. 492, § 95.
—— v. Regent's Canal Co., 7 Eng. Rail. Cas. 780; 23 L. J. (Exch.) 145, §§ 69, 216.
Warner v. Doran, 30 Iowa, 521, § 345.
Warren v. Bunnell, 11 Vt. 600, §§ 12, 27.
—— v. Grand Haven, 30 Mich. 24, § 55.
—— v. St. Paul R. R., 21 Minn. 424, §§ 174, 175; 18 Minn. 384, §§ 313, 316.
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Warwick Institute v. City of Providence, — R. I. —, §§ 74, 103.
Washington Cemetery v. Prospect Park R. R., 68 N. Y. 591, § 49.
Washington Park, 56 N. Y. 145, §§ 312, 313.
Washington Park Commissioners, 52 N. Y. 131, § 115.
Washington R. R. v. Switzer, 26 Gratt. 661. §§ 237, 242.
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Waterman v. Connecticut R. R., 30 Vt. 610, §§ 189, 216, 220.
Waters v. United States, 4 Ct. of Cl. 389, § 8.
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Watkins v. Great Northern Rail. Co., 20 L. J. (Q. B.) 391, § 81.
—— v. New York Central R. R., 47 N. Y. 157, § 74.
—— v. Walker County, 18 Texas, 585, §§ 127, 128.
Watson v. Pittsburgh R. R., 37 Pa. 469, §§ 166, 218.
—— v. South Kingstown, 5 R. I. 562, §§ 24, 279.
—— v. Trustees, 21 Ohio St. 667, § 128.
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Weaver's Road, 45 Pa. 405, § 328.
Webb v. Manchester & Leeds Rail. Co., 4 Myl. & Cr. 116, § 43.
Webber v. Eastern R. R., 2 Metc. 147, §§ 163, 165.
Weir v. St. Paul R. R., 18 Minn. 155, §§ 11, 14, 61, 91, 94, 152.
Welch v. Wilwaukee R. R., 27 Wis. 108, § 167.
Welles v. Cowles, 4 Conn. 182, § 67.
Wellington, petitioner, 16 Pick. 87, §§ 40, 46, 128, 268.
Wells v. Somerset R. R., 47 Me. 345, § 120.
Wells County Road, 7 Ohio St. 16, §§ 227, 228.
Wentworth v. Farmington, 51 N. H. 128, §§ 228, 231.
West v. Bancroft, 32 Vt. 367, § 55.
West Boston Bridge v. Middlesex, 10 Pick. 270, § 46.
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West Covington *v.* Freking, 8 Bush. 121, § 52.
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—— *v.* Patterson, 37 Md. 125, § 322.
West Pennsylvania Inst. *v.* Edgewood R. R., 79 Pa. 257, §§ 10, 11, 28.
West Pennsylvania R. R. *v.* Hill, 56 Pa. 460, § 207.
—— *v.* Johnston, 59 Pa. 290, § 144.
West Pikeland Road, 63 Pa. 471, § 279.
West River Bridge *v.* Dix, 6 How. 507, §§ 11, 22, 37, 41, 42, 91; 16 Vt. 446, § 322.
West Virginia Transp. Co. *v.* Oil Co., 5 W. Va. 382, §§ 14, 108.
Westbrook *v.* North, 2 Me. 179, § 51.
Western R. R. *v.* Dickson, 30 Wis. 389, §§ 226, 322.
Western Pacific R. R. *v.* Reed, 35 Cal. 621, §§ 113, 246.
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Wetmore *v.* Story, 22 Barb. 414, § 208.
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Whitcher *v.* Benton, 48 N. H. 157, §§ 103, 152, 262.
White *v.* Boston R. R., 6 Cush. 420, §§ 113, 172.
—— *v.* Charlotte R. R., 6 Rich. L. 47, §§ 162, 166.
—— *v.* Coleman, 6 Gratt. 138, § 338.
—— *v.* Fitchburg R. R., 4 Cush. 440, § 170.
—— *v.* Nashville, 7 Tenn. 518, § 144.
—— *v.* Norfolk, 2 Cush. 361, §§ 24, 111.
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—— *v.* Yazoo City, 27 Miss. 357, § 195.
White Deer Creek Co. *v.* Sassaman, 67 Pa. 415, §§ 81, 165.
White River Turnpike Co. *v.* Vermont Central R. R., 21 Vt. 590, §§ 39, 41, 42.
Whitehead *v.* Arkansas R. R., 28 Ark. 460, §§ 91, 149.
Whitehouse *v.* Androscoggin R. R., 52 Me. 208, §§ 186, 220.
Whiteman's Executors *v.* Wilmington R. R., 2 Harr. 514, §§ 11, 61, 91, 149.
Whitewater R. R. *v.* McClure, 29 Ind. 536, §§ 149, 162, 166, 212.
Whitman *v.* Boston R. R., 7 Allen, 313, §§ 82, 152, 153, 168, 169, 170, 175; 3 Allen, 133, §§ 106, 151, 191.
Whitmore *v.* Smith, 29 L. J. (Exch.) 402, § 237.
Whitney *v.* Boston, 98 Mass. 312, §§ 152, 169, 173.
—— *v.* Lynn, 122 Mass. 338, § 313.
Whittieer *v.* Portland R. R., 38 Me. 26, §§ 182, 185, 199.
Whittlesey *v.* Hartford R. R., 23 Conn. 421, § 329.
Whitworth *v.* Puckett, 2 Gratt. 528, §§ 217, 294.
Wiggin *v.* Exeter, 13 N. H. 304, § 280.
—— *v.* Mayor, 9 Paige, 16, § 76.
Wilbur *v.* Taunton, 123 Mass. 522, § 197.
Wilcox *v.* Oakland, 49 Cal. 29, § 160.
Wild *v.* Deig, 43 Ind. 455, § 26.
Wilkerson *v.* Buchanan County, 12 Mo. 328, § 311.
Wilkin *v.* St. Paul R. R., 16 Minn. 271, §§ 98, 180.
Willey *v.* Epping, 16 N. H. 58, § 319.
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William and Anthony Sts., 19 Wend. 678, §§ 68, 69, 71, 173, 243, 245.
Williams, petitioners, 59 Me. 517, § 264.
Williams *v.* Hartford R. R., 13 Conn. 397, §§ 99, 108.
—— *v.* Natural Bridge Plank-Road, 21 Mo. 580, §§ 84, 51, 134, 207.
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Williams *v.* Nelson, 23 Pick. 141, § 290.
—— *v.* Pittsburgh, 33 Pa. 71, § 91.
—— *v.* School District, 33 Vt. 271, § 17.
Williamson *v.* Cass County, 84 Ill. 361, § 91.
Willing *v.* Baltimore R. R., 5 Whart. 460, § 246.
Willoughby *v.* Shipman, 28 Mo. 50, §§ 288, 289.
Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245, § 16.
Willyard *v.* Hamilton, 7 Ohio, pt. 2, 111, §§ 13, 14, 91.
Wilmarth *v.* Knight, 7 Gray, 294, §§ 295, 308.
Wilmington Canal Co. *v.* Dominguez, 50 Cal. 505, § 322.
Wilmington R. R. *v.* Condon, 8 Gill. & J. 443, § 322.
—— *v.* Stauffer, 60 Pa. 374, § 168.
Wilson *v.* European R. R., 67 Me. 358, §§ 74, 103.
—— *v.* Hathaway, 42 Iowa, 173, §§ 94, 98, 104.
—— *v.* Lynn, 119 Mass. 174, § 116.
—— *v.* Mayor of New York, 1 Denio, 595, § 195.
—— *v.* Myers, 4 Hawks, 73, § 291.
—— *v.* Rockford R. R., 59 Ill. 273, §§ 149, 162.
—— *v.* Whitsell, 24 Ind. 306, §§ 258, 269, 275.
Winchester R. R. *v.* Washington, 1 Rob. (Va.) 67, § 258.
Windham *v.* Commissioners, 26 Me. 406, §§ 270, 277.
Windsor *v.* Field, 1 Conn. 279, §§ 97, 112, 275, 277.
Winebiddle *v.* Pennsylvania R. R., 2 Grant, 32, § 246.
Winkley *v.* Salisbury County, 14 Gray, 443, § 292.
Winnisimmet Co. *v.* Grueby, 111 Mass. 543, §§ 92, 170.
Winona R. R. *v.* Denman, 10 Minn. 267, §§ 50, 166, 212, 316.
—— *v.* Waldron, 11 Minn. 515, §§ 151, 158, 162, 166, 212.
Winslow *v.* Gifford, 6 Cush, 327, § 36.
Winter *v.* Peterson, 24 N. J. L. 524, §§ 52, 53.
Winterbottom *v.* Earl of Derby, 86 L. J. (Exch.) 194, § 206.
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Wolcott Mfg. Co. *v.* Upham, 5 Pick. 292, § 302.
Wolfe *v.* Covington R. R., 15 B. Mon. 404, § 199.
Wood *v.* Commissioners, 62 Ill. 391, §§ 95, 240.
—— *v.* Stourbridge Rail Co., 16 C. B. (N. S.) 222, § 193.
—— *v.* Truckee Turnpike Co., 24 Cal. 474, § 14.
Woodfolk *v.* Nashville R. R., 2 Swan, 422, §§ 135, 151, 158.
Woodman *v.* Commissioners, 24 Me. 151, § 337.
Woodring *v.* Forks Township, 28 Pa. 355, § 56.
Woodruff *v.* Neal, 28 Conn. 165, §§ 52, 53, 56.
Woods *v.* Nashua Co., 4 N. H. 527, § 64.
Woodstock *v.* Gallup, 28 Vt. 587, § 18.
Woolsey *v.* Hamilton County, 32 Iowa, 130, §§ 98, 100, 228.
—— *v.* Tompkins, 23 Wend. 324, §§ 230, 284.
Wooster *v.* Great Falls Co., 39 Me. 246, §§ 291, 292.
Wooten *v.* Campbell, 7 Dana, 204, § 289.
Wootton's Trusts (*In re*), 7 L. T. (N. S.) 630, § 67.
Worcester R. R. *v.* Railroad Commissioners, 118 Mass. 561, §§ 44, 46.
Workman *v.* Mifflin, 30 Pa. 362, § 69.
Wright *v.* Carter, 27 N. J. L. 76, §§ 34, 55.
—— *v.* Pugh, 16 Ind. 106, §§ 288, 289, 303.
—— *v.* Stowe, 4 Jones L. 516, § 294.
—— *v.* Wells, 29 Ind. 354, §§ 100, 101.
—— *v.* Wisconsin R. R., 29 Wis. 341, § 161.

Wyman *v.* Lexington R. R., 13 Metc. 316, §§ 168, 169, 170, 248.
—— *v.* Mayor of New York, 11 Wend. 487, § 225.
Wyoming Coal Co. *v.* Price, 81 Pa. 156, § 50.

Yates *v.* Milwaukee, 10 Wall. 497, §§ 6, 79, 80.
Yost's Report, 17 Pa. 524, §§ 98, 126.
Young *v.* Buckingham, 5 Ohio, 485, §§ 60, 230, 238.
Young *v.* Harrison, 17 Ga. 30, §§ 158, 162, 173, 175.
—— *v.* Mackenzie, 3 Ga. 31, § 87.
—— *v.* Price, 2 Munf. 534, § 308.
Youngstown *v.* Moore, 30 Ohio St. 133, §§ 180, 196.

Zack *v.* Pennsylvania R. R., 25 Pa. 394, § 119.
Zimmerman *v.* Union Canal Co., 1 Watts & S. 346, §§ 66, 80.

EMINENT DOMAIN.

CHAPTER I.

DEFINITIONS.

§ 1. Definitions and sources of power.
2. Distinction between the power of eminent domain and that of taxation.
3. Taking by virtue of the war-power.
4. Taking by virtue of overruling necessity.
5. Destruction of buildings to prevent the spread of conflagration.
6. Condemnation of property as a nuisance.
7. Interference with property by the police power.
8. Forfeiture for violation of law.
9. Regulation of the use of private property.

§ 1. **Definitions and sources of power.** — Eminent domain, or the power of the sovereign to condemn private property for public use, has been recognized and treated of by jurists for centuries. The commentators on the civil law treat it as an established power of long standing. Puffendorf calls it the "exercise of transcendental propriety;" as if the sovereign thereby resumed possession of that which had been previously granted to the subject upon the condition that it might be again resumed to meet the necessities of the sovereign.[1] The seizure of private property in time of war to answer the military necessities of the sovereign, and the imposition of uniform contributions from the subject, in the shape of taxation, are coördinate powers, and do not require a return or compensation to the subject. As a general rule, any contribution made by a subject to a sovereign, greater than his quota or pro-

[1] Puffendorf, b. 8, c. 5, § 8; Fletcher v. Peck, 6 Cranch, 87.

portion, requires compensation to the subject.[1] The Civil Code of France[2] recognizes the necessity of just compensation, and the annals of all nations enjoying a constitutional government, and of many despotic nations, show that the moral sense of mankind requires such compensation.[3] In the United States this right of the subject is secured by the Federal Constitution, and by a separate clause in the bill of rights of almost every state in the Union. In the absence of provisions in the constitutions, the courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void.[4] The constitutions of the states do not confer upon the legislatures the power of eminent domain, but they recognize its existence and attach conditions upon the exercise of the power.[5] The right existed prior to the constitutions."[6]

§ 2. **Distinction between the power of eminent domain and that of taxation.** — Taxation exacts property from individuals as their respective shares of contribution to a public burden. Private property taken by the power of eminent domain is not taken as the owner's share of such a contribution, but as so much beyond it. Taxation operates upon a class of persons and things, and by some rule of appor-

[1] Puffendorf, b. 8, c. 3.

[2] Art. 545: "No one can be compelled to give up his property, except for the public use, and for a just and previous indemnity."

[3] Binney's Case, 2 Bland, 99.

[4] Mount Washington Road, 35 N. H. 134; Bradshaw *v.* Rogers, 20 Johns. 103; Gardner *v.* Newburgh, 2 Johns. Ch. 162; Sinnickson *v.* Johnson, 17 N. J. L. 129; Harness *v.* Chesapeake Canal Co., 1 Md. Ch. 248; Hamilton *v.* Annapolis R. R., 1 Md. Ch. 107; Freedle *v.* North Carolina R. R., 4 Jones L. 89; Raleigh R. R. *v.* Davis, 2 Dev. & B. 451. The only cases doubting this proposition are in South Carolina. The State *v.* City Council, 12 Rich. L. 702; Patrick *v.* Commissioners, 4 McCord, 541; McLauchlin *v.* Charlotte R. R., 5 Rich. L. 583; The State *v.* Dawson, 3 Hill (S. C.), 100.

[5] Todd *v.* Austin, 34 Conn. 78; Wallace *v.* Karlenowefski, 19 Barb. 118.

[6] Heyward *v.* Mayor of New York, 7 N. Y. 314; Brown *v.* Beatty, 34 Miss. 227; Martin, *ex parte*, 18 Ark. 198.

tionment. The exercise of eminent domain operates on individual persons and things, and without any reference to what is exacted from others.[1] Local assessments for water-rates or benefits,[2] or to pay subscriptions to railroads,[3] are not properly in the exercise of eminent domain, but of the power of taxation. Taxation to raise bounty for soldiers is not a taking of private property for public use,[4] although levied on a party not subject to draft.[5] The taking of money by a tax is not a taking of private property for public use, within the meaning of the constitutional provision concerning eminent domain,[6] and the sale of property for taxes is not by virtue of that power.[7]

§ 3. **Taking by virtue of the war-power.**[8]—The State is not obliged to make compensation for damages done to its citizens by its own troops in time of war, although done wantonly and without authority, or for damages caused by the occupation of the enemy. The destruction of crops or supplies, to prevent their falling into the hands of the enemy, is supported on the grounds of the public safety.[9] By the strict rules of international law, the property of citizens, found in the enemy's lines, may be taken by the State without liability for compensation. This power will

[1] The People *v.* Mayor of Brooklyn, 4 N. Y. 419; Newby *v.* Platte County, 25 Mo. 258; Gilman *v.* Sheboygan, 2 Black, 510; Booth *v.* Woodbury, 32 Conn. 118; Hammett *v.* Philadelphia, 65 Pa. 146; Moale *v.* Baltimore, 5 Md. 314; Aurora *v.* West, 9 Ind. 74; Emery *v.* San Francisco Gas Co., 28 Cal. 345.

[2] Allen *v.* Drew, 44 Vt. 174; Lexington *v.* McQuillan's Heirs, 9 Dana, 513; Chambers *v.* Satterlee, 40 Cal. 497; Emery *v.* San Francisco Gas Co., 28 Cal. 345; Moran *v.* Troy, 16 N. Y. Sup. Ct. 540.

[3] Grant *v.* Courter, 24 Barb. 232.

[4] Booth *v.* Woodbury, 32 Conn. 118.

[5] The State *v.* Demarest, 32 N. J. L. 528.

[6] Emery *v.* San Francisco Gas Co., 28 Cal. 345; Martin *v.* Dix. 52 Miss. 53.

[7] Griffin *v.* Dogan, 48 Miss. 11.

[8] For a valuable series of articles on the war power of the State, and the distinctions between the powers of eminent domain and the war-power for military purposes, see 18 Am. L. Reg. 265, 337, 401.

[9] Respublica *v.* Sparhawk, 1 Dall. 383.

not justify an officer of the volunteer militia in ordering an encampment of militia on a man's land without his consent, such act in time of peace being a trespass,[1] or of impressing provisions for the purpose of sending the same to the armies in the field, there being no immediate urgency.[2] Private property impressed by virtue of the war-power is not controlled by the constitutional provisions in relation to eminent domain, and does not revert to the owner, although existing *in specie*, after the war.[3] The Supreme Court of Kentucky[4] has held, without good reason, that the emancipation of the slaves, during the civil war, was an exercise of the power of eminent domain, requiring compensation to the owners of the slaves.

The Federal government, in the late civil war, mitigated the harshness of the ancient rule by legislation. Compensation has been generally provided for property taken or occupied in the loyal states during the war. When land was entered upon and occupied, the occupation was considered to be under an implied lease, at a reasonable rental, which was determined by an appraisement.[5]

§ 4. **Taking by virtue of overruling necessity.** — Another power of the State by which private property is taken or injured, where no compensation is provided to the owner, is that of a taking by virtue of overruling necessity. Exigencies arise which no law has anticipated, and which cannot await the action of the legislature.[6] Property may be destroyed to make bulwarks against floods, and houses may be razed to prevent the spreading of fire, because for the

[1] Brigham v. Edmands, 7 Gray, 359.

[2] Cunningham v. Campbell, 33 Ga. 625; Cox v. Cummings, 33 Ga. 549. See also Mitchell v. Harmony, 13 How. 115.

[3] Taylor v. Nashville R. R., 6 Coldw. 646.

[4] Corbin v. Marsh, 2 Duv. 198.

[5] Johnson v. United States, 4 Ct. of Cl. 248; Waters v. United States, 4 Ct. of Cl. 389.

[6] Parham v. Justices, 9 Ga. 341; Hale v. Lawrence, 23 N. J. L. 605.

public good.[1] A destruction of a building not on fire, to prevent the spreading of fire is not a taking of the property for public use.[2] The common law protected individuals, on the ground of overruling necessity, from acts which would otherwise have been trespass. If a road be founderous, a passenger may lawfully go through a private enclosure.[3] So if a man is assaulted, he may fly through another's close.[4]

§ 5. **Destruction of buildings to prevent the spread of a conflagration.** — By the common law, the actors in destroying buildings were liable for an injudicious exercise of the right, and in order to prevent a failure to exercise promptness and vigor in time of such emergencies, on account of reluctance of individuals to assume the risk, statutes have been passed in several of the states giving authority to certain officials to exercise the right. Compensation has also been provided to owners for the destruction of their property. These statutes are considered as giving a right where otherwise there was none, and, being in derogation of the common law, have been strictly construed.[5] So strict was the construction in New York that compensation was refused to the owner of merchandise within the buildings destroyed, because the statute only provided for compensation for buildings destroyed or injured.[6] The Massachusetts statute required that the effort should be the means of stopping the fire, and that no compensation should be

[1] Saltpeter Case, 12 Coke, 13; Mouse's Case, 12 Coke, 62; Taylor *v.* Plymouth, 8 Metc. 462; Mayor of New York *v.* Lord, 18 Wend. 126; *s. c.*, 17 Wend. 285; Field *v.* Des Moines, 89 Iowa, 575; Surocco *v.* Geary, 3 Cal. 69; McDonald *v.* Red Wing, 13 Minn. 38.

[2] McDonald *v.* Red Wing, 13 Minn. 38.

[3] 2 Bla. Com. 36, note by Christian.

[4] Bac. Abr. 173.

[5] Taylor *v.* Plymouth, 8 Metc. 462; Mayor of New York *v.* Lord, 18 Wend. 126.

[6] Russell *v.* Mayor of New York, 2 Denio, 461; Stone *v.* Mayor of New York, 25 Wend. 157, qualifying Mayor of New York *v.* Lord, 17 Wend. 285.

allowed when the house was partly burnt, and would have been destroyed in any event.[1] Independently of the above statutes, an officer directing the destruction of buildings under such circumstances would be justified if the exercise was necessary and judicious.[2]

§ 6. **Condemnation of property as a nuisance.** — A nuisance, whether public or private, may be abated without compensation to the owner of the property interfered with. Whether or not certain property, or the use of it, constitutes a nuisance, cannot arbitrarily be determined by the legislative branch of the government, unless the property in fact has that character. To allow that question to be determined by the legislature would place every house, business, and all property at the uncontrolled will of legislative bodies.[3] The public cannot make changes which will cause private property to become a nuisance, — as, by obstructing a stream, — and then declare the property a nuisance, so as to require its removal without compensation.[4] The object of the interference must be the preservation of the public health, or the interference will not be supported. A burying-ground may be condemned as a nuisance, but a law cannot be passed forbidding the burial of a certain class of people in the burying-ground, while another class is still allowed to be buried there. Such a law plainly indicates that the burying-ground is not such a nuisance as requires abating.[5] The fact that the lots belong to individuals, and have been used for burial purposes for over a hundred years,

[1] Taylor *v.* Plymouth, 8 Metc. 462; Parsons *v.* Pettingell, 11 Allen, 507.

[2] American Print Works *v.* Lawrence, 23 N. J. L. 590; where a citizen of New Jersey endeavored to hold the mayor of New York personally liable for destruction of his property in New York, which had been destroyed under the direction of the mayor.

[3] Yates *v.* Milwaukee, 10 Wall. 497.

[4] Chicago *v.* Laflin, 49 Ill. 172.

[5] Austin *v.* Murray, 16 Pick. 121.

does not create any additional right in the owner, or make the condemnation as a nuisance a taking by eminent domain.[1]

§ 7. **Interference with property by the police power.** — Property may be taken or its use interfered with by the state, without compensation, by exercise of the police power of the state. Regulations which tend to benefit the public health, to remove causes of disease or public discomfort, are legitimate exercises of this power. The owner of property may be restrained from a noxious use of his property, and such a restraint is not a taking of the property. The owner is restrained, not because the public have occasion to make the like use or any use of the property, or to take any benefit or profit from it, but because the use is noxious to the public. It is not an appropriation to the public use, but the restraining of an injurious private use by the owner.[2] No compensation is provided, as the owner is presumed to be compensated by his share in the advantages arising from such beneficial regulations.[3] While it is proper to control property so as to secure the public health, it is not proper to impress property for use as hospitals, without compensation. The police power may be exercised to prevent the spread of disease by disinfecting property and destroying infected clothing, but cannot justify the occupation of a house as a hospital without paying for it.[4] To compel railroads to erect cattle-guards is an exercise of police power, and not of eminent domain, as it tends to protect the lives of the travelling public as well as the lives of animals.[5] Railroads may be made responsible for damages from fire communicated by engines, without impairing the

[1] Coates *v.* Mayor of New York, 7 Cow. 585.

[2] The Commonwealth *v.* Alger, 7 Cush. 53; Baker *v.* Boston, 12 Pick. 184; St. Louis *v.* Stern, 8 Mo. App. 48.

[3] Baker *v.* Boston, 12 Pick. 184.

[4] Markham *v.* Brown, 37 Ga. 277.

[5] Thorpe *v.* Rutland R. R., 27 Vt. 140.

privileges of their charters or taking their property.[1] The legislature may, by general laws, make railroad companies responsible for the torts and negligence of companies leasing their roads.[2] Owners may be restrained from taking sand and gravel from beaches on their own land because it would endanger the safety of a harbor, from cutting through the embankment of a river, or from removing trees which protect the banks of a river.[3] A riparian owner may be compelled to keep up a levee to protect the surrounding country from inundation; and if he refuses, it may be kept up at his expense.[4] The course of a river may be straightened for the protection of a populous district, although injurious consequences may accrue to individuals, and such proceeding is a proper exercise of police power.[5]

§ 8. **Forfeiture for violation of law.**—Property taken and destroyed as forfeited for violation of law is not taken for public use, but under a penalty, and hence requires no compensation.[6] The forfeiture to the state of the property of a corporation, on account of abuse of charter powers, gives to the corporation no claim for compensation.[7] Tools and appliances for immoral or criminal purposes are properly forfeited and destroyed. The manufacture and sale of intoxicating liquor may be declared unlawful and the liquor forfeited. The fact that buildings and machinery devoted to the manufacture of liquor thereby become greatly reduced in value does not call for compensation to the owner.[8] Regulations are made whereby the weight of a loaf of bread sold by vendors is controlled, and bread short in weight for-

[1] Rodemacher *v.* Milwaukee R. R., 41 Iowa, 297.
[2] Nelson *v.* Vermont Central R. R., 26 Vt. 717.
[3] The Commonwealth *v.* Tewksbury, 11 Metc. 55.
[4] Bouligny *v.* Dormenon, 2 Mart. (N. S.) La. 455.
[5] Green *v.* Swift, 47 Cal. 536.
[6] The State *v.* Snow, 3 R. I. 64.
[7] Erie R. R. *v.* Casey, 26 Pa. 287.
[8] The People *v.* Hawley, 3 Mich. 330.

feited. For the forfeiture of such bread the owner has no remedy.[1]

§ 9. **Regulation of the use of private property.** — There seems to be a power in the legislature, other than that of eminent domain, by which the enjoyment of private property is controlled without the consent of the owner, and without compensation to him. There are regulations for the better and more economical management of the property of adjoining owners, which, for various reasons, may be better managed by joint operation. The legislature may prescribe regulations as to the building of party-walls,[2] division fences and ditches,[3] and may provide for the payment to occupying claimants for the improvements which they may have erected believing that they possessed a good title. The laws protecting the equities of occupying claimants have been extended so as to give occupying claimants the option of taking the land without the consent of the owner.[4] Such an extension of the law seems to present a case where private property is taken from one individual and given to another without the owner's consent.[5] The power of the legislature to enact such laws can hardly be considered as a part of the power of eminent domain, or of the police power, for the reason that it is exercised, in fact, for the benefit of individuals, and as a convenient method of settling private disputes.[6]

The Illinois Legislature has made provisions regulating the charges of public elevators, and the Supreme Court of that state has sustained the regulation, arguing that such regulations do not change the title, possession, or use of the

[1] Guillotte *v.* New Orleans, 12 La. An. 432.

[2] Hunt *v.* Armbruster, 17 N. J. Eq. 208; 3 Kent's Com. 438; Hart *v.* Kucher, 5 Serg. & R. 1.

[3] Coster *v.* Tide-Water Co., 18 N. J. Eq. 54.

[4] 1 Wag. Stat. Mo. 561, §§ 20–24.

[5] McCoy *v.* Grandy, 3 Ohio St. 468.

[6] Hart *v.* Kucher, 5 Serg. & R. 1.

warehouse; that such occupation is a public one, and may be regulated in the same manner as that of hackmen, of draymen, and on the same grounds of policy which have sustained laws fixing the price and weight of bread, the rate of interest on money, etc.; and that such regulations do not amount to a taking of private property for public use.[1] On appeal, the Supreme Court of the United States[2] affirmed the decision of the court below, Waite, C. J., delivering the opinion; Field and Strong, JJ., dissenting. In the course of the opinion, Waite, C. J., says:

"Statutes regulating the use, or even the price of the use, of private property do not necessarily deprive the owner of his property without due process of law." * * * "Property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

The states may regulate the tenure of real property within their limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, and hence may prohibit the devise of real property to corporations.[3]

"Statutes which authorize the sale of lands held in joint tenancy, tenancy in common, or coparcenary, whenever partition cannot be conveniently made, are constitutional.[4] The legislature may authorize the sale of property in which

[1] Munn *v.* The People, 69 Ill. 80. Statutes regulating the weight and price of bread are sustained in Alabama. Mobile *v.* Yuille, 8 Ala. (N. S.) 140.

[2] Munn *v.* Illinois, 94 U. S. 113.

[3] United States *v.* Fox, 94 U. S. 315.

[4] Richardson *v.* Monson, 23 Conn. 94.

certain persons have life-estates and others remainders, taking care that the proceeds shall go to trustees for the use and benefit of those having the life-estate and of those having the remainder, as they are entitled under the will. This is depriving no one of his property, but is merely changing real into personal estate, for the benefit of all parties in interest.[1] It is unconstitutional to interfere with the use of private property by prohibiting the owners of land within three hundred yards of fair-grounds from opening stables for the purpose of receiving for pay horses, vehicles, etc., during the continuance of the fair." [2]

[1] Linsley *v.* Hubbard, 44 Conn. 109; Sohier *v.* Massachusetts General Hospital, 3 Cush. 496; Rice *v.* Parkman, 16 Mass. 326.

[2] The Commonwealth *v.* Bacon, 13 Ky. 210.

CHAPTER II.

OF USES CONSIDERED PUBLIC.

§ 10. Whether the use is public — Province of the legislature.
11. The propriety or policy of the condemnation not a judicial question.
12. How many people must use, in order to make the use public.
13. The public need not own nor operate the improvement — Incidental private advantage.
14. Means of transportation — Railroads, canals, ferries, roads, and bridges.
15. Public character of mills.
16. Draining of marshes — Reclaiming land.
17. School-houses.
18. Facilities for public health or recreation — Parks — Water-works.
19. Burying-grounds.
20. Encouragement of mines.
21. Improvements unknown to the framers of the Constitution — Miscellaneous public uses.

§ 10. **Whether the use is public — Province of the legislature.** — The legislature cannot so determine that the use is public as to make the determination conclusive upon the courts. The attempt of the legislature to determine the public character of the use does not settle that it has the right to do so, but the existence of the public use in any class of cases is a question to be determined by the courts.[1] The presumption is in favor of the public character of a use declared to be public by the legislature,[2] and unless it is seen at the first blush that it is not possible for the use to be public, the courts cannot interfere. There can be no way for courts to be possessed of all the facts

[1] Tyler v. Beacher, 44 Vt. 648; Northern Central Coal Co. v. Coal and Iron Co., 37 Md. 537; Parham v. Justices, 9 Ga. 341; Anderson v. Turbeville, 6 Coldw. 150; Memphis Freight Co. v. Memphis, 4 Coldw. 419; Channel Co. v. Railroad, 51 Cal. 269; Sadler v. Langham, 34 Ala. 311.

[2] West Pennsylvania Inst. v. Edgewood R. R., 79 Pa. 257.

and circumstances which the legislative department had before it in each particular case.[1] An abuse of a general act authorizing condemnation for private purposes will not be tolerated.[2] The Missouri Constitution of 1875, art. II, sec. 20, provides "that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

§ 11. **The propriety or policy of the condemnation not a judicial question.** — If the use is certainly a public one, then the legislative authority over the subject cannot be restrained or supervised by the courts. Only when it is plainly perceived that there is an attempt to evade the law and procure the condemnation of property for a private use, or to accomplish an end not public in its character, will the courts declare the act void;[3] or if it was doubtful or questionable whether the use was public or not, testimony might be admissible to determine the fact. The legislature is the proper body to determine the necessity of the exercise of the power, and the extent[4] to which the exercise shall be carried, and there is no restraint upon the power save that requiring that compensation shall be made.[5] As soon as

[1] Stockton R. R. v. Stockton, 41 Cal. 147.

[2] Bankhead v. Brown, 25 Iowa, 540.

[3] Pittsburgh v. Scott, 1 Pa. St. 309.

[4] North Missouri R. R. v. Gott, 25 Mo. 540; Bonaparte v. Camden R. R., Baldw. 205; Concord R. R. v. Greely, 17 N. H. 47; Hingham Bridge v. Norfolk, 6 Allen, 353; Water-Works Co. v. Burkhart, 41 Ind. 364; Challiss v. Atchison R. R., 16 Kan. 117.

[5] County Court of St. Louis County v. Griswold, 58 Mo. 175; Brooklyn Park v. Armstrong, 45 N. Y. 234; Secombe v. Milwaukee R. R., 23 Wall. 108; Weir v. St. Paul R. R., 18 Minn. 155; Dickey v. Tennison, 27 Mo. 373; Tyler v. Beacher, 44 Vt. 648; Haverhill Bridge v. County Commissioners, 103 Mass. 120; John and Cherry Streets, 19 Wend. 659; Bloodgood v. Mohawk R. R., 18 Wend. 9; Harris v. Thompson, 9 Barb. 350; Beekman v. Saratoga R. R., 3 Paige, 45; Coster v. Tide-Water Co., 18 N. J. Eq. 54; Whiteman's Executors v. Wilmington R. R., 2 Harr. 514; Northern Central Coal Co. v. Coal and Iron

the court has arrived at the conclusion that the use is public, then the judicial function is gone, and there is no restraint on the legislative discretion. The degree of public usefulness need not be determined by the court,[1] or whether the proposed plan will accomplish the end desired.[2] Statutes palpably improvident and hasty must still be sustained by the courts.[3] The particular property needed may be pointed out by the legislature,[4] and the courts cannot consider the question whether or not other land equally feasible can be obtained by purchase.[5] The question of necessity or propriety may be delegated by the legislature to boards of commissioners or to the courts,[6] but in the absence of such delegation the legislative determination is conclusive. Judge Woodbury,[7] in the case of West River Bridge *v.* Dix, seemed to doubt whether property which was not absolutely necessary, but only convenient, for public use could be condemned, and indicated that if property could be purchased, it should not be condemned for such purposes as hospitals, court-houses, and jails; but the practice of all the states and of the Federal government, since that time, in condemning land for such purposes has been so frequent that the legislative control over the necessity and the particular location is almost universally conceded. The present New York doctrine is that the court is to determine, upon the application by a railroad company to acquire lands, the question of the necessity and extent of the appropriation, and that

Co., 87 Md. 587; Anderson *v.* Turbeville, 6 Coldw. 150; Bankhead *v.* Brown, 25 Iowa, 540.

[1] Dietrich *v.* Murdoch, 42 Mo. 279.

[2] West Pennsylvania Inst. *v.* Edgwood R. R., 79 Pa. 257.

[3] Smedley *v.* Erwin, 51 Pa. 445.

[4] Aldridge *v.* Tuscumbia R. R., 2 Stew. & P. 199.

[5] Giesy *v.* Cincinnati R. R., 4 Ohio St. 308.

[6] Lecour *v.* Police Jury, 20 La. An. 308; Power's Appeal, 29 Mich. 504. The decision of a municipal corporation, to which is delegated certain powers of condemnation, is not always conclusive on the courts. Milwaukee R. R. *v.* Faribault, 23 Minn. 167.

[7] 6 How. 507.

the land-owner may contest the question. The burden is on the company to show the necessity.[1]

§ 12. **How many people must use, in order to make the use public.** — It is not essential that the whole community, or any considerable portion thereof, should directly enjoy or participate in an improvement, to make the use public. If the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the community, the use is public.[2] The use, to be public, must concern the community, but not necessarily every individual in the community, or that every individual should have an equal interest.[3] The legislature determines the sufficiency of the number of people to be benefited in order to constitute the use a public one.[4] Water-works for a particular town are for the public use.[5] Ways denominated private, which the public may use, are sustained as constitutional.[6] A park may be established in a county, in such a place that it could be beneficial only to a city immediately adjacent. Although the city is a distinct municipality, it is still a part of the county, because the greater portion of the population of the county may be in the city.[7]

§ 13. **The public need not own nor operate the improvement — Incidental private advantage.** — It is not necessary that the public should own the property taken. It may be owned by a private corporation, such as a railroad

[1] Matter of New York Central R. R. 66 N. Y. 407.

[2] Talbot *v.* Hudson, 16 Gray, 417; O'Reiley *v.* Draining Co., 32 Ind. 169.

[3] Gilmer *v.* Lime Point, 18 Cal. 229.

[4] Aldridge *v.* Tuscumbia R. R., 2 Stew. & P. 199.

[5] Inhabitants of Wayland *v.* Middlesex, 4 Gray, 500.

[6] Sherman *v.* Buick, 32 Cal. 241; Warren *v.* Bunnell, 11 Vt. 600; Killbuck Private Road, 77 Pa. 39; Sadler *v.* Langham, 34 Ala. 311; Shaver *v.* Starrett, 4 Ohio St. 494.

[7] County Court of St. Louis *v.* Griswold, 58 Mo. 175.

company, canal company, or even by a private individual. Ownership and use are not synonymous. The constitution is satisfied if the use is public and the public may have the privilege of using the same.[1] The public use is not confined to actual uses by the government or its officers. It is sufficient if of advantage or benefit to the community.[2] Should those to whom is delegated the control of the improvement refuse to allow the public, under reasonable regulations, to enjoy the improvement, their charters or franchises would be subject to forfeiture.[3] It does not signify that profit will accrue to private individuals, or that tolls are charged.[4] The government habitually moves through the agency of employees, and they may be compensated by the profits of the enterprise. No great public work could be completed by the government in which some profit would not accrue to individuals.[5] The agents who accomplish the objects do not determine the public character of the use, but the fact that the public may use and that the improvement may be useful to the public.[6]

§ 14. **Means of transportation — Railroads, canals, ferries, roads, and bridges.** — The best examples of public use, and the most frequent exercise of the power of eminent domain, occur in securing means of transportation and intercommunication between different portions of the state.[7] Railroads are compelled by law to transport over their lines, at reasonable times, and at prices frequently limited by law, all such passengers and freight, not of a

[1] Concord R. R. v. Greely, 17 N. H. 47; Bloodgood v. Mohawk R. R., 18 Wend. 9; Brown v. Beatty, 34 Miss. 227.

[2] Olmstead v. Camp, 33 Conn. 532.

[3] Bloodgood v. Mohawk R. R., 18 Wend. 9.

[4] Concord R. R. v. Greely, 17 N. H. 47.

[5] Stockton R. R. v. Stockton, 41 Cal. 147.

[6] Willyard v. Hamilton, 7 Ohio, pt. 2, p. 111.

[7] Buffalo R. R. v. Ferris, 26 Texas, 588; O'Hara v. Lexington R. R., 1 Dana, 232; Arnold v. Covington Bridge, 1 Duv. 372.

dangerous character, as shall be offered for transportation, and this constitutes the use a public one.[1] Although a railroad corporation may be a private one, yet its work is public as much as if the road were constructed by the state. Upon no other ground than that the purpose is public can the exercise of the power of eminent domain in behalf of such corporations be supported.[2] On this ground alone rests the authority for the issue of bonds to assist railroads, and of taxation to meet the same.[3] Railroads are, in fact, public highways.[4] The circumstance that the railroad company uses its own cars exclusively is not material,[5] or that the tolls are collected for its own exclusive use.[6] Under the head of railroads may be included lines of tubing for the transportation of oil.[7] The power of the state to condemn land for the use of canals,[8] ferries,[9] public roads, turnpikes,[10] and bridges [11] has never been denied. The tolls or profits of all these means of intercommunication may properly be collected by the corporations or individuals owning them. The true criterion by which to judge of the character of the use is whether the public may enjoy it

[1] Buffalo R. R. v. Brainard, 9 N. Y. 100; Beekman v. Saratoga R. R., 3 Paige, 45; Raleigh R. R. v. Davis, 2 Dev. & B. 451; Swan v. Williams, 2 Mich. 427.

[2] Pine Grove v. Talcott, 19 Wall. 666; Secombe v. Milwaukee R. R., 23 Wall. 108; Weir v. St. Paul R. R., 18 Minn. 155; Concord R. R. v. Greely, 17 N. H. 47; Brown v. Beatty, 34 Miss. 227; Swan v. Williams, 2 Mich. 427; Stewart v. Polk County, 30 Iowa, 9.

[3] Pine Grove v. Talcott, 19 Wall. 666; Stockton R. R. v. Stockton, 41 Cal. 147.

[4] Railroad v. Chappell, Rice, 383.

[5] Bloodgood v. Mohawk R. R., 18 Wend. 9; Swan v. Williams, 2 Mich. 427.

[6] Swan v. Williams, 2 Mich. 427; Bonaparte v. Camden R. R., Baldw. 205.

[7] West Virginia Transp. Co. v. Oil Co., 5 W. Va. 382.

[8] Chesapeake Canal Co. v. Key, 3 Cranch C. Ct. 599; Willyard v. Hamilton, 7 Ohio, pt. 2, p. 111.

[9] Day v. Stetson, 8 Me. 365.

[10] Mount Washington Road, 35 N. H. 134; The State v. Maine, 27 Conn. 641.

[11] Arnold v. Covington Bridge, 1 Duv. 372; Palmer v. The State, Wright (Ohio), 364. Bridges are highways as much as any other section of the road. Crosby v. Hanover, 36 N. H. 404.

by right or only by permission, and not to whom the tax or toll for supporting them is paid.[1]

§ 15. **Public character of mills.** — In the early history of the country, when power to drive mills was almost exclusively confined to water-power, a system of legislation arose for the encouragement of mills, by which the power of eminent domain was delegated to persons desiring to erect mills, enabling them to condemn favorable sites for mills which they could not obtain by purchase on account of the obstinacy of the owners. In Massachusetts and Maine the mill-acts are sustained on account of a policy in force prior to the adoption of their Constitutions. Many of the courts which formerly have sustained the public character of mills, and the propriety of taking private property for that purpose by the exercise of eminent domain, continue to do so with reluctance, and consider that, if the question was brought up for decision anew, the decision would be adverse to the constitutionality of such statutes.[2] Such statutes are sustained in Massachusetts,[3] Vermont,[4] New Jersey,[5] Connecticut,[6] and Tennessee.[7] In Minnesota[8] and Kansas[9] they are sustained because other states with similar constitutions have sustained them, although they are considered as going to the extreme of legislative power. The Wisconsin Supreme Court doubt the public character of the

[1] Bonaparte *v.* Camden R. R., Baldw. 205; Rogers *v.* Bradshaw, 20 Johns. 735; Mount Washington Road, 35 N. H. 134; The State *v.* Maine, 27 Conn. 641; Wood *v.* Truckee Turnpike Co., 24 Cal. 474.

[2] Occum Co. *v.* Sprague Co., 35 Conn. 496; Powers *v.* Bears, 12 Wis. 213; Fisher *v.* Horicon Co., 10 Wis. 351.

[3] Hazen *v.* Essex Co., 12 Cush. 475; Andover *v.* Sutton, 12 Metc. 182; Boston Mill-Dam *v.* Newman, 12 Pick. 467.

[4] Tyler *v.* Beacher, 44 Vt. 648.

[5] Scudder *v.* Trenton Falls Co., 1 N. J. Eq. 694.

[6] Olmstead *v.* Camp, 33 Conn. 532.

[7] Harding *v.* Goodlett, 3 Yerg. 41.

[8] Miller *v.* Troost, 14 Minn. 365.

[9] Harding *v.* Funk, 8 Kan. 315.

use.[1] The doctrine is denied in Maine,[2] New York,[3] Georgia,[4] Alabama,[5] and Michigan.[6] Judge Cooley, in the recent case of Ryerson *v.* Brown, 35 Mich. 333, has reviewed the entire law on the subject, and the history of the legislation on the subject, and concludes that the question is not one of necessity, but of comparative cost, and that the use is not properly a public one. The Supreme Court of the United States, in Holyoke Company *v.* Lyman,[7] recognize to a certain extent the public use of mills, and approve the exercise of eminent domain in cases where, from the nature of the country, mill-sites sufficient in number could not otherwise be obtained. This decision, however, was by Judge Clifford, who was familiar with the long course of decisions in Massachusetts supporting the constitutionality of the mill-acts, and in a case in error from the state of Massachusetts. The reasons for encouraging mills in early times, when capital was small and steam as a motive-power had not been discovered, have largely ceased to exist, and there is now no reason for indulging owners of mills over owners of public groceries, hotels, or theatres.[8]

§ 16. **Draining of marshes — Reclaiming land.** — The draining of a marsh, whereby valuable land is reclaimed and the health of the community is improved, is a work of such public benefit as to justify the exercise of the power of eminent domain.[9] It is not an usurpation of judicial functions for

[1] Powers *v.* Bears, 12 Wis. 213.
[2] Jordan *v.* Woodward, 40 Me. 317.
[3] Hay *v.* Cohoes Co., 3 Barb. 42.
[4] Loughbridge *v.* Harris, 42 Ga. 500.
[5] Sadler *v.* Langham, 34 Ala. 311.
[6] Ryerson *v.* Brown, 35 Mich. 333, overruling Newcomb *v.* Smith, 1 Chand. 71.
[7] 15 Wall. 500.
[8] Jordan *v.* Woodward, 40 Me. 317.
[9] Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Henry *v.* Thomas, 119 Mass. 583; Dingley *v.* Boston, 100 Mass. 544; Hartwell *v.* Armstrong, 19 Barb. 166; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518; Norfleet *v.* Cromwell, 70 N. C. 634; Anderson *v.* Kerns Draining Co., 14 Ind. 199.

the legislature to declare a marsh a nuisance, and provide for its reclamation.[1] A dam which flows a large and valuable tract of land may be cut down for the purpose of reclaiming the land and devoting it to tillage. The agricultural interests may be promoted in the exercise of eminent domain as well as any other interest.[2] Drains which the public may use on proper terms are public.[3] The drainage of one's farm simply to render it more valuable to the owner would not be a public, but a private, undertaking, and it does not make the use more public that the work is done by a corporation formed for purposes of draining.[4] Land may be condemned for the purpose of making sewers to drain a city.[5] In New Jersey[6] and Indiana[7] the regulations concerning drainage are referred to the police power.

§ 17. **School-houses.** — Land may be appropriated for the erection of a school-house[8] and for a school-yard.[9] The use proposed is not local and limited, but public. Schools are a public necessity, and as taxation for schools is supported, the exercise of eminent domain is equally justified in providing suitable locations. The use need not be universal.[10] The practice of condemnation for this purpose exists without question in many of the states.[11]

§ 18. **Facilities for public health or recreation — Parks — Water-works.** — Land may be condemned in order

[1] Ding'ey *v.* Boston, 100 Mass. 544.
[2] Talbot *v.* Hudson, 16 Gray, 417.
[3] Norfleet *v.* Cromwell, 70 N. C. 634.
[4] Anderson *v.* Kerns Draining Co., 14 Ind. 199.
[5] Hildreth *v.* Lowell, 11 Gray, 345.
[6] The State *v.* Blake, 36 N. J. L. 442.
[7] O'Reiley *v.* Draining Co., 82 Ind. 169.
[8] Township Board *v.* Hackman, 48 Mo. 243.
[9] Williams *v.* School District, 33 Vt. 271.
[10] Williams *v.* School District, 33 Vt. 271.
[11] Peckham *v.* School District, 7 R. I. 545; Appointment of Viewers, Wyoming Common Pleas, 4 Leg. Gaz. 410; Long *v.* Fuller, 68 Pa. 170.

to promote the public health, or to provide public parks[1] for the use of the public at large, and drives for pleasure or recreation.[2] In laying out a road, it need not be considered with what purpose people will travel the proposed road. Roads are not made solely for the travel of those engaged on business or duty, but may be made for healthy recreation, or to visit points esteemed as pleasing natural scenery,[3] or to supply a drive-way, or avenue to a burying-ground.[4] The public health of cities requires an abundant supply of pure water, and for this purpose land may be condemned for reservoirs and other facilities for supplying cities with water,[5] although the act contains no provision in express terms requiring the corporation to supply, on reasonable terms, all persons applying for water.[6] In like manner, supplies of water may be condemned.[7] The early doctrine was that property could not be taken for ornamental purposes only,[8] and it has been doubted whether land could be condemned to ornament and beautify court-house grounds.[9] Streets may be widened, and court-yards left which are for ornament and not open to public travel.[10]

§ 19. **Burying-grounds.** — Public burying-grounds may be established and enlarged, and for such purposes land may be condemned.[11] An old burying-ground or a private burying-ground may be condemned for the use of the pub-

[1] County Court of St. Louis *v.* Griswold, 58 Mo. 175; Higginson *v.* Nahant, 11 Allen, 530; Brooklyn Park *v.* Armstrong, 45 N. Y. 234.

[2] Mount Washington Road, 35 N. H. 134.

[3] Higginson *v.* Nahant, 11 Allen, 530.

[4] Balch *v.* Commissioners of Essex, 103 Mass. 106.

[5] Inhabitants of Wayland *v.* Middlesex, 4 Gray, 500; Kane *v.* Baltimore, 15 Md. 240; Thorn *v.* Sweeney, 12 Nev. 251.

[6] Lumbard *v.* Stearns, 4 Cush. 60.

[7] Burden *v.* Stein, 27 Ala. 104.

[8] Bynkershoek, as cited in Gardner *v.* Newburgh, 2 Johns. Ch. 162.

[9] Woodstock *v.* Gallup, 28 Vt. 587.

[10] Bushwick Ave., 48 Barb. 9.

[11] Edgecumbe *v.* Burlington, 46 Vt. 218; Edwards *v.* Stonington Cemetery Assn., 20 Conn. 466.

lic.[1] If the association is a private one, and the right of burial is not vested in the public, or in the public authorities, or subject to their control, but only in the individual lot-owners, and the land so taken is only to be divided out among individual owners, the use cannot be considered public.[2]

§ 20. **Encouragement of mines.** — Akin to the acts which allow condemnation for mill-sites are those acts for the encouragement of mines. In mining districts valuable interests may remain undeveloped on account of the obstinacy of owners who refuse to allow their lands to be used for the necessary tunnels, ditches, flumes, pipes, and dumping-places. Roads may be necessary to reach the mines and to transport the wood, lumber, and materials necessary for carrying on the business of mining. Such statutes have been passed in California and Nevada. In the former state they are held not to justify the condemnation of land for the use of an individual or single corporation,[3] while in the latter the act does not seem to confine the exercise to cases where the roads or appliances would or could be used by more than one individual.[4] There is no doubt that the public may establish a public road to mines, as it is important to the public that mineral wealth should be developed.[5] In Pennsylvania and Maryland similar statutes are passed for the development of mines, which will be considered hereafter under the head of Private Roads. Iron-works have been suggested as a proper public use.[6] In Georgia the condemnation of right of way over unoccupied lands, for the carriage of water necessarily used in gold mining, is recognized as legitimate.[7]

[1] Balch *v.* Commissioners of Essex, 103 Mass. 106.
[2] Matter of Deansville Cemetery Assn. 66 N. Y. 569.
[3] Channel Co. *v.* Railroad, 51 Cal. 269.
[4] Dayton Mining Co. *v.* Seawell, 11 Nev. 394.
[5] Bankhead *v.* Brown, 25 Iowa, 540.
[6] Tipton *v.* Miller, 8 Yerg. 423.
[7] Hand Gold Mining Co. *v.* Parker (Sup. Ct. Ga. 1877), 6 Rep. 105.

§ 21. **Improvements unknown to the framers of the constitution — Miscellaneous public uses.** — The term "public use" is flexible, and cannot be confined to the public use known at the time of the framing of the constitution. All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain. Any use of any thing which will satisfy a reasonable public demand for facilities for travel, for transmission of intelligence or of commodities, would be a public use.[1] In view of the large logging and lumber interests of some of the states, it has been held that land might be condemned for the erection of booms.[2] The coast survey carried on under the auspices of the United States government is a public use, and justifies the taking of private property for its accomplishment. Trees may be felled and land occupied for that purpose.[3] It has been doubted whether the power could be exercised to encourage the erection of warehouses for the convenience of the public alone, and where the legislature fixed no rates of toll or storage, and assumed no regulation of charges.[4] A railroad may be authorized to run a track to an elevator for the general convenience of the public using the elevator.[5]

[1] Concord R. R. *v.* Greely, 17 N. H. 47. The power of eminent domain may be exercised in favor of a corporation erecting a telegraph line for general transmission of intelligence. New Orleans Telegraph Co. *v.* Southern Telegraph Co., 53 Ala. 211.

[2] Patterson *v.* Boom Co., 3 Dill. 465; Lancaster *v.* Kennebeck Co., 62 Me. 272; Lawler *v.* Baring Boom Co., 56 Me. 443; Cotton *v.* Boom Co., 22 Minn. 372. Dams known as "splash-dams," for the purpose of floating lumber, are recognized in Pennsylvania. Finney *v.* Somerville, 80 Pa. 59.

[3] Orr *v.* Quimby, 54 N. H. 590.

[4] Memphis Freight Co. *v.* Memphis, 4 Coldw. 419.

[5] Clarke *v.* Blackmar, 44 N. Y. 150.

CHAPTER III.

OF USES CONSIDERED PRIVATE.

§ 22. Condemnation for private use.
23. Condemnation of property for sale or for use by others.
24. Inducements to declare use public — Donations of land — Payment of damages by individuals.
25. Settlement of private disputes — Sales of land of minors.
26. Private or neighborhood roads.
27. Roads denominated private which the public may use.
28. Lateral railroads.
29. Ways of necessity.

§ 22. **Condemnation for private use.** — The use to which property is condemned must be public. As between individuals, no necessity however great, no exigency however imminent, no improvement however valuable, no refusal however unneighborly, no obstinacy however unreasonable, no offers of compensation however extravagant, can compel or require a man to part with one inch of his estate.[1] Neither has the legislature the right to take the property of one individual or corporation and give it to another, even if compensation is provided.[2] If consent be given, the question does not in fact arise.[3] It is immaterial to the state in which one of its citizens land may be vested, but it is of primary importance that when once vested it shall be secured.[4] The fact that individuals may be greatly benefited by a public improvement cannot operate to pre-

[1] Bangor R. R. *v.* McComb, 60 Me. 290.

[2] Hepburn's Case, 3 Bland, 95; West River Bridge *v.* Dix, 10 How. 507; Bangor R. R. *v.* McComb, 60 Me. 290. For an exception to this general statement, see *ante*, § 9.

[3] Embury *v.* Connor, 3 N. Y. 511.

[4] Van Horne's Lessee *v.* Dorrance, 2 Dall. 310.

vent the exercise of legislative power, if the use is in fact public.[1] It is proper to consider whether or not a large number of individuals may not be benefited by the proposed improvement.[2]

§ 23. **Condemnation of property for sale or for use by others.** — Property cannot be taken for the purpose of being leased out or sold to private parties. The surplus beyond the amount required by the public is not properly taken, not being needed for the public use, and the owners are entitled to such surplus.[3] An entire lot cannot be taken in widening a street, when the entire lot is not needed, and with the intention of afterwards selling the remainder. Such portions of lots not needed for public use cannot be taken under such condemnation, without the owner's consent, although compensation is made. Such statute may be construed so as to stand, by holding that the owner's consent must be given.[4] In Connecticut[5] it has been considered that there may be a grant for the erection of a structure the result of which will be the production of an article or thing intended to be furnished or sold to the public to supply their reasonable wants; and that for this purpose an extensive water-power may be created, portions of which are to be offered for sale to the public. The land of one person cannot be taken to be used by another, and thereby lessen his damages, although such condemnation is proposed by a corporation authorized to condemn. The owner of a mill-privilege was damaged in the construction of a

[1] Cottrill *v.* Myrick, 12 Me. 222.

[2] Hopkinton *v.* Winship, 35 N. H. 209; Talbot *v.* Hudson, 16 Gray, 417.

[3] Varick *v.* Smith, 5 Paige, 137; Buckingham *v.* Smith, 10 Ohio, 288; Cooper *v.* Williams, 5 Ohio, 391.

[4] Embury *v.* Connor, 3 N. Y. 511; Matter of Albany St., 11 Wend. 149. The English act, 8 & 9 Vict., c. 18, § 92, provides "that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building, or manufactory, if such party be willing and able to sell and convey the whole thereof."

[5] Todd *v.* Austin, 34 Conn. 78; Occum Co. *v.* Sprague Co., 35 Conn. 496.

canal, by having his water-supply taken away. The canal company endeavored to supply his loss, and thereby lessen the damages to be paid by it, by condemning a portion of the land of an adjoining owner for the purpose of constructing a feeder to the mill. The adjoining owner objected that his land was taken for the private use of the owner of the mill, and his objection was sustained. The mill-owner could be compensated in money, and not in privileges. The condemnation was plainly not for the use of the canal.[1]

§ 24. **Inducements to declare use public — Donations of land — Payment of damages by individuals.** — The question of determining the necessity of a public improvement is frequently delegated to the commissioners or to the courts. The laying-out of highways is a matter of public concern. They are laid out because the public need them, and the judgment of the court or of the commissioners should not be determined by proposed donations of land,[2] or releases from damages,[3] or on the fact that the damages were to be paid by individuals.[4] If the agreement is not the basis of the adjudication, it would be proper that the public should be relieved of a portion or all of the damages by individuals.[5] The public have a right to consider the expense, and that the public will not need an expensive road, but would be greatly benefited by one of moderate expense to the public.[6] Donations of money or land[7] may

[1] McArthur v. Kelly, 5 Ohio, 139.

[2] Dudley v. Cilley, 5 N. H. 558; Dudley v. Butler, 10 N. H. 281; The State v. Stites, 13 N. J. L. 172.

[3] Smith v. Conway, 17 N. H. 586.

[4] Gurnsey v. Edwards, 26 N. H. 224; Knowles's Petition, 22 N. H. 361.

[5] Denham v. Bristol, 108 Mass. 202; Harrington v. Harrington, 1 Metc. 404; Parks v. Boston, 8 Pick. 218; Hays v. Risher, 32 Pa. 169; Hoadley v. Waterbury, 34 Conn. 88; Townsend v. Hoyle, 20 Conn. 1.

[6] Hunter v. Newport, 5 R. I. 325; Townsend v. Hoyle, 20 Conn. 1; Hoadley v. Waterbury, 34 Conn. 88.

[7] Hoadley v. Waterbury, 34 Conn. 88; Cummins v. Shields, 34 Ind. 154.

be made, bonds of indemnity given,[1] and releases of damages made[2] without interfering with the discretion to be exercised by public authorities in deciding upon the public necessity or convenience of a proposed improvement, and such bonds and releases are valid and may be enforced.[3] The damages due a particular remonstrant may be paid into the treasury for his use by individuals, without invalidating the adjudication;[4] but it would be against public policy to permit interested individuals to induce, by payment of money, the withdrawal of opposition to the laying-out of a road, when such remonstrance is made because there was no necessity for the road.[5] The entire damages of a way for the peculiar benefit of the applicant may be assessed against such applicant.[6]

§ 25. **Settlement of private disputes — Sales of land of minors.** — It cannot be claimed that the taking of property from one and giving it to another, to bring to an end an extensive litigation of disputed titles, can be a taking for public use, although such settlement would tend to produce public harmony and a more extended improvement of the property in question. This question received an able discussion in the case of Van Horne's Lessee *v.* Dorrance.[7] The Pennsylvania Legislature passed an act confirming the title of claimants under Connecticut grants, to certain lands in Luzerne County, and providing compensation for those under the Pennsylvania title by arranging to give them vacant or unoccupied land of equal value. This act was

[1] Watson *v.* South Kingstown, 5 R. I. 562; Hunter *v.* Newport, 5 R. I. 325; Townsend *v.* Hoyle, 20 Conn. 1.

[2] Crockett *v.* Boston, 5 Cush. 182; White *v.* Norfolk, 2 Cush. 361, overruling The Commonwealth *v.* Sawin, 2 Pick. 547.

[3] Hoadley *v.* Waterbury, 34 Conn. 38; Townsend *v.* Hoyle, 20 Conn. 1.

[4] Cummins *v.* Shields, 34 Ind. 154.

[5] Smith *v.* Applegate, 23 N. J. L. 352.

[6] Denham *v.* Bristol, 108 Mass. 202; Harrington *v.* Harrington, 1 Metc. 404; Parks *v.* Boston, 8 Pick. 218; Hays *v.* Risher, 32 Pa. 169.

[7] 2 Dall. 304.

invalid as being a condemnation for private use. In Philadelphia there exist a number of irredeemable ground-rents, and the Legislature, in order to relieve owners of lands out of which issued such ground-rents, passed an act to cause the rent to be valued, and to be extinguished by the payment of a capital sum. This act was declared to be unconstitutional, as being a taking for private use. The policy of the law against tying up property perpetually could not affect the private contract already existing.[1] The legislature may authorize the sale of the lands of those who are incompetent to convey, but otherwise cannot compel the sale of private property for other than public uses without the consent of the owner.[2]

§ 26. **Private or neighborhood roads.** — Land cannot be condemned for the purpose of making a private road for the particular use of an individual, although he may pay the entire cost of opening and maintaining it. The use is not public.[3] It does not signify that compensation is provided. Private property cannot be taken for private use even on compensation.[4] Owners may consent, and if they sue in *assumpsit* for the damages they waive their constitutional rights,[5] although their consent is not to be presumed or extended.[6] The rights of owners cannot be evaded by calling the road a "neighborhood road" or a "right of way," if the road could be lawfully used by none other except the

[1] Palairet's Appeal, 67 Pa. 479 (Agnew, J., dissenting), overruling Norris *v.* Clymer, 2 Pa. 277.

[2] Powers *v.* Bergen, 6 N. Y. 358. See also *ante*, § 9, for sales of lands held in joint tenancy, life-estates, remainders, etc.

[3] Taylor *v.* Porter, 4 Hill, 140 (overruling Lambert *v.* Hoke, 14 Johns. 388); Rice *v.* Alley, 1 Sneed, 51; Clack *v.* White, 2 Swan, 540; Stewart *v.* Hartman, 46 Ind. 331; Wild *v.* Deig, 43 Ind. 455 (overruling Barnard *v.* Haworth, 9 Ind. 103); Osborn *v.* Hart, 24 Wis. 89; Bankhead *v.* Brown, 25 Iowa, 540; Sadler *v.* Langham, 34 Ala. 311; Nesbitt *v.* Trumbo, 39 Ill. 110; Crear *v.* Crossley, 40 Ill. 175; Dickey *v.* Tennison, 27 Mo. 373.

[4] Clack *v.* White, 2 Swan, 540.

[5] Baker *v.* Braman, 6 Hill, 47.

[6] Dempsey *v.* Kipp, 62 Barb. 311; Nesbitt *v.* Trumbo, 39 Ill. 110.

applicant.[1] It has sometimes been considered that the public have an interest in securing private ways to individuals, so that they may reach public roads on duties which may be public, such as voting, paying taxes, testifying, etc.,[2] but this may more properly be accomplished by making a highway which the public may use. The public use does not depend on the number of people who may use the road.[3] In Reynolds *v.* Reynolds,[4] the Supreme Court of Connecticut recognize that a private way for the sole use of the applicant may be lawfully laid over the lands of others, although such road only connects two tracts of the applicant. In this case the question of constitutionality of the statute was not insisted on, but the practice was approved. The Constitution of the state of Michigan[5] provides for private ways, and for the determination of the necessity of such roads by a jury.

§ 27. **Roads denominated private which the public may use.** — The fact that few persons will use the road is

[1] Dickey *v.* Tennison, 27 Mo. 373; Créar *v.* Crossley, 40 Ill. 175.

[2] Brewer *v.* Bowman, 9 Ga. 37; McCauley *v.* Dunlap, 4 B. Mon. 57. In the recent case of Robinson *v.* Swope, 12 Ky. 21, it is held that whenever a private pass-way is necessary to enable a citizen to discharge those duties which he owes the public, and to enjoy the benefits of the government under which he lives, the private property of another citizen may be taken for the establishment of such pass-way upon compensation being made, and such use will be regarded as public within the meaning of that term as used with reference to the right of eminent domain. The public have a right to compel the attendance of any citizen upon the tribunals of justice, either as a witness, juror, or party, and have an interest in his attendance upon elections and the public worship of Almighty God; and, because of these rights and interests, the public also have a further interest that the citizen shall be provided with a practicable way to a market at which he can buy and sell, and thus provide himself with those things without which he could not discharge his civil and social duties. But the legislature cannot authorize the condemnation of a private pass-way simply for the purpose of connecting two tracts belonging to the same party. It might provide that communication from each of said tracts to the outside world, to enable the owner or his tenants or employees to attend courts, elections, a church, or a mill, but not for a pass-way simply to enable him to pass from one tract of land to another.

[3] Bankhead *v.* Brown, 25 Iowa, 540.

[4] 15 Conn. 83.

[5] Art. 18, § 4; Paul *v.* Detroit, 32 Mich. 108.

not essential in considering the public character of the road. If the public may use the way, the way is public although it may be termed a private road.[1] It is not considered unreasonable that common convenience and necessity might require that access to the dwelling of a single inhabitant should be afforded to persons visiting on business or friendship, without commission of trespass.[2] Over such roads the applicant has no particular control. The public may discontinue against the will of the applicant, and they are only private in respect to certain matters of practice in opening and maintenance.[3] It does not signify that such road is laid out at the expense of the applicant,[4] and is to be kept in repair by him.[5] A road may be wholly on the land of an individual, and may enter from the highway and return to the highway at about the same place; and it is not necessary that the road should be in the line of business travel, if the public may use it for the purposes of pleasure-driving.[6] In Pennsylvania, one terminus of roads denominated private must be at the plantation or dwelling of the petitioner.[7] In Pennsylvania, legislation on the subject of private roads has been extensive. Roads are permitted under as well as above ground. Private roads are sustained which lead over the land of one man for the benefit of another, for the purpose of access to highways or places of necessary public resort, or even to private ways leading to highways. It is the connection of these private ways with public highways,

[1] Warren *v.* Bunnell, 11 Vt. 600; Killbuck Private Road, 77 Pa. 39; Singleton *v.* Commissioners, 2 Nott & M. 526; Sadler *v.* Langham, 34 Ala. 311; Kissinger *v.* Hanselman, 88 Ind. 80; Sherman *v.* Buick, 32 Cal. 241; Shaver *v.* Starrett, 4 Ohio St. 494.

[2] Denham *v.* Bristol, 108 Mass. 202; Roberts *v.* Williams, 15 Ark. 48; Sherman *v.* Buick, 32 Cal. 241.

[3] Allen *v.* Stevens, 29 N. J. L. 509; Perrine *v.* Farr, 22 N. J. L. 356.

[4] Sherman *v.* Buick, 32 Cal. 241.

[5] Shaver *v.* Starrett, 4 Ohio St. 494; Allen *v.* Stevens, 29 N. J. L. 509; Perrine *v.* Farr, 22 N. J. L. 356.

[6] Higginson *v.* Nahant, 11 Allen, 530.

[7] Killbuck Private Road, 77 Pa. 39; Sandy Lick Road, 51 Pa. 94.

or with places of necessary public resort, together with the implied right or license of the public to use them, at least in going to and from the premises of the person laying them out, quite as much as, if not more than, the consideration of purely individual rights, that have won for these private-road acts judicial recognition of constitutionality. The roads laid out are *quasi*-public roads. If the public cannot use the roads, the constitutionality of the acts cannot be sustained.[1]

§ 28. **Lateral railroads.** — In Pennsylvania[2] and Maryland,[3] railroads are authorized by statute to extend from public railroads, canals, and streams to mines belonging to individuals, but these acts cannot be abused for purposes purely private.[4] The acts were passed for the purpose of developing mineral lands, by enabling the owner to obtain access to the transportation facilities of railroads, canals, and streams, when parties owning the adjoining lands refuse access through their lands. If the owner of the land desired to use his wharfage facilities, he would be entitled to the first right, but he must *bonâ fide* intend to make such improvements himself.[5] These roads may be used by all who will pay proper toll.[6] No lateral road can be established if the applicant has another right of way.[7] There is a statute authorizing such railroads in West Virginia, but the constitutionality of the act has never been distinctly affirmed. In the only case yet decided under the statute,[8] it appeared to the court that the public could not

[1] Waddell's Appeal, 84 Pa. 90.

[2] Shoenberger *v.* Mulhollan, 8 Pa. 134; Harvey *v.* Lloyd, 3 Pa. 331; Harvey *v.* Thomas, 10 Watts, 63.

[3] Northern Central Coal Co. *v.* Coal and Iron Co., 37 Md. 537.

[4] West Pennsylvania Inst. *v.* Edgewood R. R., 79 Pa. 257; also cited Edgewood Co.'s Appeal, 79 Pa. 257.

[5] Hays *v.* Briggs, 74 Pa. 373; Hays *v.* Risher, 32 Pa. 169.

[6] Brown *v.* Corey, 43 Pa. 495; Boyd *v.* Negley, 40 Pa. 377: Hays *v.* Risher, 32 Pa. 169.

[7] Boyd *v.* Negley, 40 Pa. 377.

[8] Salt Co. *v.* Brown, 7 W. Va. 191.

in any way use the subterraneous way proposed, and that the use was for the applicant solely, and hence decided that public utility did not require the laying-out of the proposed road.

§ 29. **Ways of necessity.** — By the common law, if a person has a close bounded on every side by his own lands, and grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant, or, as it is sometimes termed, a way of necessity; for otherwise he cannot derive any benefit from the grant.[1] There can be no such way when there is a possible way over the owner's own land.[2] Such a way only arises out of land granted or reserved by the grantor, and not out of the lands of a stranger.[3] A legislative regulation of the manner in which this right shall be ascertained and determined is not an exercise of eminent domain, nor a taking of private property for private use.[4] There is also a common law of necessity where the way is founderous. This is only a temporary right of way, and does not apply to a case where a highway laid along the bank of a river has been permanently destroyed by changes in the course of the stream. The adjoining land cannot be used after such permanent change, but there must be a new condemnation.[5]

[1] Selw. N. P. 1041.

[2] Perry *v.* Webb, 21 La. An. 247. If the grantee has access to the highway, a right to a way of necessity does not exist, although lands of the grantor may lie between the land granted and the highway. Kuhlman *v.* Hecht, 77 Ill. 570.

[3] Stewart *v.* Hartman, 46 Ind. 331.

[4] Snyder *v.* Warford, 11 Mo. 513.

[5] The Commonwealth *v.* Beeson, 8 Leigh, 821.

CHAPTER IV.

OF WHAT CONSTITUTES A TAKING.

§ 30. Injury or depreciation of property.
31. Taking an easement.
32. Additional burden of railroad upon highways, turnpikes, and canals.
33. Highway an additional burden on a railroad.
34. Turnpike not an additional burden on public road.
35. Ferry-landing additional burden on highway.
36. Preliminary survey not a taking.

§ 30. **Injury or depreciation of property.** — There should be a liberal construction of the word "taking." The constitutional provision is adopted for the protection of and security to the rights of the individual as against the government, and the term "taking" cannot be limited to the absolute conversion of real property to the uses of the public, and not include cases where the value is destroyed by irreparable and permanent injury inflicted on it.[1] Any permanent change in title, or encumbrance on property, or exclusion of the owner from its enjoyment,[2] or substantial injury to the land, — such as discharging water upon it, — is a taking within the meaning of the constitution.[3] A partial destruction or diminution in value is a taking.[4] A deposit of stone

[1] Pumpelly *v.* Green Bay Co., 13 Wall. 166.

[2] Cushman *v.* Smith, 34 Me. 247.

[3] Pumpelly *v.* Green Bay Co., 13 Wall. 166; Lee *v.* Pembroke Iron Co., 57 Me. 481; Selden *v.* Delaware Co., 24 Barb. 362; Chase *v.* New York Central R. R., 24 Barb. 273; Morris Canal Co. *v.* Seward, 23 N. J. L. 219; Wabash Canal *v.* Spears, 16 Ind. 441; Grand Rapids Co. *v.* Jarvis, 30 Mich. 308; Arimond *v.* Green Bay Co., 31 Wis. 316; Hooker *v.* New Haven Co., 14 Conn. 146. Taking materials for repair of roads cannot be justified unless compensation is provided. Reynolds *v.* Speers, 1 Stew. 34.

[4] Glover *v.* Powell, 10 N. J. Eq. 211.

and rubbish upon land is such a taking as to require compensation.[1] It does not signify that the improvements are made with proper skill and care.[2] The injury to the owner's enjoyment of his property is the basis of his claim. For damages resulting from unskilful and negligent construction, the owner has his remedy at common law. Throwing an arch over property, or tunnelling it, is such a permanent use of land as to constitute a taking.[3]

Although the damage may be nominal, yet if the act violates the rights of any one, and the violation is of such a nature that, if it be continued for a sufficient period of time, the wrong-doer may acquire a title by adverse possession or presumption of a grant, the person whose rights are violated may maintain an action therefor without proof of any other actual damages.[4]

§ 31. **Taking an easement.** — The right to use property is the valuable feature of property. Property is the right to possess, use, enjoy, and dispose of a thing. The right of using necessarily includes the right and power of excluding others from using the same property. The constitution is intended to protect all the essential elements of ownership which make property valuable, and when an easement of any sort is taken in property, a certain portion of the property is taken, and that taking requires compensation.[5] Easements which owners have over the lands of others are property, and a taking or interference with the same is a damage for which compensation should be paid.[6]

[1] East Pennsylvania R. R. *v.* Schollenberger, 54 Pa. 144.

[2] Selden *v.* Delaware Co., 24 Barb. 362.

[3] Pinchin *v.* London & Blackwall Rail. Co., 5 De G. M. & G. 851; Sparrow *v.* Oxford, Worcester & Wolverhampton Rail. Co., 2 De G. M. & G. 94: Ramsden *v.* Manchester Rail. Co., 12 Jur. 293.

[4] Lund *v.* New Bedford, 121 Mass. 286; New Orleans Telegraph Co. *v.* Southern Telegraph Co., 53 Ala. 211.

[5] Eaton *v.* Boston & Maine R. R., 51 N. H. 504; Branson *v.* Philadelphia, 47 Pa. 329; McLauchlin *v.* Charlotte R. R., 5 Rich. L. 583.

[6] Arnold *v.* Hudson R. R., 55 N. Y. 661.

The change from a private way of necessity, to a public highway, is an additional burden, and requires compensation. A public way is a new and larger use of the lands, and generally imposes new duties as to fences and repairs, for which the owner should have indemnity.[1] A railroad is an additional burden upon a private right of way.[2] A change from one public use to another, essentially the same, gives no claim for compensation.[3] A right to shoot and fish over certain lands was not considered to be included in the subjects of compensation covered by the English Lands Clauses Consolidation Act.[4]

§ 32. Additional burden of railroad upon highways, turnpikes, and canals. — The imposition of an additional burden upon property constitutes a taking. Damages are paid to owners for the burden upon their premises of a public highway or turnpike. These damages are accepted on the understanding that the easement taken shall be for the purpose of a turnpike or highway, and not for a use which will be more burdensome to the adjoining owner. For the additional burden additional compensation should be provided.[5] The public may change the character of its highways, and pay no additional damages when the use is not essentially changed.[6] The use of a highway by a railroad is not a mere modification of the public servitude, but an entirely new use. It is not like the change of a highway

[1] Abbott *v.* Stewartstown, 47 N. H. 228.

[2] Greenwood *v.* Wilton R. R., 28 N. H. 261; Parker *v.* Boston R. R., 8 Cush. 107; Philadelphia R. R. *v.* Williams, 54 Pa. 103; Gear *v.* Railroad, 89 Iowa, 23; Glover *v.* North Staffordshire Rail. Co., 20 L. J. (Q. B.) 376; Watkins *v.* Great Northern Rail. Co., 20 L. J. (Q. B.) 391.

[3] Stetson *v.* Bangor, 60 Me. 318.

[4] Bird *v.* Great Eastern Rail. Co., 34 L. J. (C. P.) 366.

[5] Hatch *v.* Cincinnati R. R., 19 Ohio St. 92; Chapman *v.* Oshkosh R. R., 38 Wis. 629; Kucheman *v.* C. C. & D. R. R., 46 Iowa, 366.

[6] Whitman *v.* Boston R. R., 7 Allen, 313. The use of a plank-road by a railroad is not considered an additional burden as to the owner. Brainard *v.* Missisquoi R. R., 48 Vt. 107.

into a turnpike road. The public cannot use the railroad with their own vehicles on paying toll. On a discontinuance of the highway, the land reverts to the former owner; but a discontinuance of a highway on which there is a railroad would leave the railroad there. For such an occupation there should be additional damages to the adjoining owners.[1] The consent of the owner to a highway which benefits his land and renders access to it easy does not extend to an occupation by a railroad, which makes access both difficult and dangerous, and which depreciates the value of his land.[2] A railroad is an additional burden on a turnpike,[3] especially when such portion is used for depot or platform purposes.[4] This burden is not only additional to the turnpike company, but to the adjoining owners, and the turnpike company cannot convey their road to a railroad company so as to cut out the rights of the adjoining owner; for the change of the turnpike to a railroad operates as an abandonment of the turnpike to a different use, thereby allowing a reversion to the owner, who may recover damages in trespass.[5] A town which has paid damages for the establishment of a public highway may also recover damages for the expense necessary in establishing and maintaining a new road.[6] This doctrine would not apply to necessary crossings,[7] but to permanent occupations of sections of

[1] Imlay *v.* Union Branch R. R., 26 Conn. 249; Wager *v.* Troy Union R. R., 25 N. Y. 526; Williams *v.* New York Central R. R., 16 N. Y. 97; Trustees *v.* Auburn R. R., 8 Hill, 567; Starr *v.* Camden R. R., 24 N. J. L. 592; Troy *v.* Cheshire R. R., 23 N. H. 83; South Carolina R. R. *v.* Steiner, 44 Ga. 546.

[2] Williams *v.* New York Central R. R., 16 N. Y. 97; Mahon *v.* New York Central R. R., 24 N. Y. 658; Davis *v.* Mayor of New York, 14 N. Y. 506; Craig *v.* Rochester R. R., 39 Barb. 494; Kucheman *v.* C. C. & D. R. R., 46 Iowa, 366.

[3] Seneca Rd. Co. *v.* Auburn R. R., 5 Hill, 170; Mahon *v.* Utica R. R., Lalor, 156; Ellicottville Rd. *v.* Buffalo R. R., 20 Barb. 644; Kenton County Court *v.* Turnpike Co., 10 Bush, 529.

[4] Higbee *v.* Camden R. R., 19 N. J. Eq. 276.

[5] Mahon *v.* New York Central R. R., 24 N. Y. 658.

[6] Troy *v.* Cheshire R. R., 23 N. H. 83.

[7] Bordentown Turnpike Co. *v.* Camden R. R. 17 N. J. L. 314.

roads. In Pennsylvania[1] and Iowa[2] no compensation is provided, as the use is considered a proper modification of an existing use. The construction of a railroad on the site of a canal is not an additional burden,[3] unless it destroys certain easements which are inconsistent with the changed use,[4] or renders the access to the land more difficult by cuts and embankments.[5] The construction of a railroad across a right of flowage,[6] or on a levee or landing,[7] is an additional burden.

§ 33. **Highway an additional burden on a railroad.** — The laying of a highway across a railroad-track is considered an additional burden in those states where the law imposes upon the railroad company the additional expense of erecting and maintaining signs at the crossings, of erecting and maintaining cattle-guards, and of flooring the crossings and keeping the planks in repair. These expenses,

[1] The Commonwealth *v.* Erie R. R., 27 Pa. 339; Cleveland R. R. *v.* Speer, 56 Pa. 325.

[2] Gear *v.* Railroad, 39 Iowa, 23. But see Kucheman *v.* C. C. & D. R. R., 46 Iowa, 366, where the owner has the fee in the street.

[3] Chase *v.* Sutton Mfg. Co., 4 Cush. 152.

[4] Whitman *v.* Boston R. R., 7 Allen, 313.

[5] Hatch *v.* Cincinnati R. R., 19 Ohio St. 92. In the case of Gordon *v.* Pennsylvania R. R., 6 Rep. 727 (Pa.), not yet reported in the regular reports, the canal, which was subsequently purchased by a railroad company and adapted to its uses, had carried off the surface-water, which before the construction of the canal had been carried off by a natural channel. The railroad company filled up the canal, and provided no channel for the water in the place of the natural one, or canal, and built a box-sewer under the railroad; and the water, shooting through the sewer at a point where there was no natural channel, formed a pond and overflowed plaintiff's land. The damages were increased by the course taken by the railroad. It was not alleged that in the assessment of damages the absurd, yet possible, act of placing a culvert under the canal to convey water to the land below entered into the consideration of anybody. No jury could anticipate such folly. When the damages were assessed for a canal, no railroad injury therefrom was in contemplation. The railroad company has no right to inflict that injury because of the settlement of all probable damages from the building of the canal.

[6] Davidson *v.* Boston R. R., 3 Cush. 91.

[7] Railroad Co. *v.* Schurmeir, 7 Wall. 272.

being directly imposed, must be paid for.[1] In New York and Pennsylvania the laying of highways across the tracks of railroads may be done without compensation,[2] and the railroad company may be compelled to make the necessary excavations, embankments, and bridges to safely accommodate the highway.[3] This authority would not include the opening of roads through grounds used for necessary buildings, yards, etc.,[4] although it was suggested in Pennsylvania that a street might be opened through depot-grounds, and that the wisdom of such action could not be questioned by the courts.[5]

§ 34. Turnpike not an additional burden on public road. — A change from a highway to a turnpike charging toll is not such an essential change as to require compensation to adjoining owners. When a highway is taken for a turnpike, it does not cease to be a highway, and the land does not revert to the owner. The payment of tolls to the turnpike company is in lieu of payment of taxes to support the road. The change is only a change of mode in sustaining the road, and not a change of use.[6] The same rule has been applied to changes from public roads to plank-roads.[7] In Williams *v.* Natural Bridge Plank-Road,[8] the Supreme Court of Missouri consider that a change which will in-

[1] Old Colony R. R. *v.* Plymouth, 14 Gray, 155; Crossley *v.* O'Brien, 24 Ind. 325.

[2] Boston R. R. *v.* Greenbush, 52 N. Y. 510; Albany R. R. *v.* Brownell, 24 N. Y. 345; Philadelphia R. R. *v.* Philadelphia, 9 Phila. 563.

[3] Albany R. R. *v.* Brownell, 24 N. Y. 345.

[4] Boston R. R. *v.* Greenbush, 52 N. Y. 510; Mohawk R. R. *v.* Artcher, 6 Paige, 83.

[5] Philadelphia R. R. *v.* Philadelphia, 9 Phila. 563.

[6] Benedict *v.* Goit, 3 Barb. 459; Walker *v.* Caywood, 31 N. Y. 51; Wright *v.* Carter, 27 N. J. L. 76; The State *v.* Laverack, 34 N. J. L. 201; Douglass *v.* Turnpike Road, 22 Md. 219; Callison *v.* Hedrick, 15 Gratt, 244; Nolensville Turnpike *v.* Baker, 4 Humph. 315; Panton Turnpike Co. *v.* Bishop, 11 Vt. 198. *Contra*, Cape Girardeau Road *v.* Renfroe, 58 Mo. 265.

[7] Walker *v.* Caywood, 31 N. Y. 51; Chagrin Falls Road *v.* Cane, 2 Ohio St. 419.

[8] 21 Mo. 580.

crease the injury and inconvenience resulting to the owner, on account of deep cuts necessary for a plank-road, renders the burden additional, and demands compensation to the owner; but this can hardly be considered sound law, as the public and turnpike companies may make changes in the grades of roads and streets without compensation to owners.[1] The converse of the proposition is also true, that a change from a turnpike to a public road is not a material change, requiring additional compensation.[2]

§ 35. **Ferry-landing additional burden on highway.** — A public highway is devoted to furnishing a right of passage to the public, and nothing more. The highway, although abutting on a navigable stream, cannot be used for the purpose of landing goods or passengers; and for such attempt the adjoining owner, or the turnpike company owning the turnpike, may recover damages.[3] The grant of a ferry license does not authorize the use of the land of another as a landing, nor can the landing be on a county road or city street, unless compensation is provided for the additional burden.[4]

§ 36. **Preliminary survey not a taking.** — An entry may be made on land, to ascertain boundaries for public purposes, without compensation, provided the entry was reasonably necessary, not too long continued, and accompanied with no unnecessary damage. Selectmen may perambulate boundaries or view land prior to laying out a road.[5] A sheriff may also enter upon land to arrest a man. An entry may be authorized for preliminary survey of a public improvement, and no compensation will be due if the

[1] Douglass *v.* Turnpike Road, 22 Md. 219.

[2] Peirce *v.* Somersworth, 10 N. H. 369; The State *v.* Maine, 27 Conn. 641; Heath *v.* Barman, 49 Barb. 496; Murray *v.* Berkshire, 12 Metc. 455.

[3] Lexington R. R. *v.* McMurtry, 8 B. Mon. 516.

[4] Prosser *v.* Wapello County, 18 Iowa, 327; Haight *v.* Keokuk, 4 Iowa, 199.

[5] Winslow *v.* Gifford, 6 Cush. 827.

occupation is temporary only, and accompanied with no unnecessary damage.[1] For all wanton and unnecessary acts, those entering would be liable in trespass.[2] A continuance of the entry made for survey, and a construction of an embankment or roadway,[3] or grading of the same,[4] will not be justified. After the construction commences, the entry can only be justified by a condemnation.[5] Temporary occupation can only be by legislative sanction. A city council have no authority to grant such privilege without legislative delegation.[6] Property cannot be occupied for a temporary road, to be used during sleighing-time, or while a regular road is being laid out, without compensation.[7] Experimenting with land will not be permitted without compensation paid or secured.[8] An exploration which consists of digging a shaft thirty feet in diameter, which was to be continued to a depth of sixty-five feet, from which a tunnel was to be made under a river, is too extensive an exploration to be called a preliminary survey, when made on land occupied by a railroad.[9]

[1] Walther *v.* Warner, 25 Mo. 277; Polly *v.* Saratoga R. R., 9 Barb. 449; The State *v.* Seymour, 35 N. J. L. 47; Steuart *v.* Mayor, 7 Md. 500.

[2] Bonaparte *v.* Camden R. R., Baldw. 205.

[3] Eidemiller *v.* Wyandotte City, 2 Dill. 376.

[4] Steuart *v.* Mayor, 7 Md. 500.

[5] Hazen *v.* Boston R. R., 2 Gray, 574; Davis *v.* San Lorenzo R. R., 47 Cal. 517.

[6] The People *v.* Third Avenue R. R., 45 Barb. 63.

[7] Holcomb *v.* Moore, 4 Allen, 529; Holden *v.* Cole, 1 Pa. 303.

[8] Ash *v.* Cummings, 50 N. H. 591.

[9] Morris R. R. *v.* Hudson Tunnel Co., 25 N. J. Eq. 384.

CHAPTER V.

IMPAIRMENT OF RIGHTS SECURED BY CONTRACTS AND CHARTERS.

§ 37. Impairment of private contracts.
38. Interference with rights secured by charters.
39. Charters not in terms exclusive.
40. Legislative contract not to condemn.
41. Condemnation of the property of a corporation.
42. Condemnation of a franchise.
43. Impairment of the enjoyment of a franchise, and regulation of the use of it.
44. Condemning a use of the property of a corporation.
45. Condemnation of property devoted to another public use.
46. Express legislative authority.
47. Condemnation under general laws of property devoted to another public use — Priority of location.

§ 37. **Impairment of private contracts.** — The legislature may not destroy or impair the rights secured to individuals by virtue of their contracts.[1] The rights of individuals in and to property contained in their contracts of transfer are protected by the constitution, but this does not interfere with the power of the state to condemn the property thus affected, on giving due compensation. The property and the contracts must yield to the demands of the sovereign.[2] The contract is not thereby impaired, for full compensation is given. A state may not annul or modify a

[1] Const. U. S., art. I., § 10; Jones *v.* Walker, 2 Paine C. Ct. 688.

[2] Brown *v.* Corey, 43 Pa. 495. Damages for the taking of property by eminent domain do not arise out of contract. The entry of the company is without consent of the owner, and needs no consent. Hence a statute allowing a stay of execution in actions for the recovery "of money due by contract, or of damages arising from breach of contract," does not apply to the case of recovery of damages for taking land by the power of eminent domain. Harrisburg R. R. *v.* Peffer, 84 Pa. 295.

grant of land, or a lease, or a mortgage on it, but it may take the land for public use on making compensation. Such an appropriation does not impair the obligation of the contract contained in the grant[1] or lease,[2] or of the covenants of warranty,[3] or for quiet enjoyment,[4] or of the encumbrance upon the land.[5] Land just granted by the state may be taken for a road.[6] The owner is protected from arbitrary seizure, and not from an appropriation by public right for public use. All persons hold their property subject to requisitions for the public service.[7] The conditions imposed upon a grant of land dedicated by an owner for a particular public purpose protect it from being applied to another and different use, unless compensation is paid.[8]

§ 38. **Interference with rights secured by charters.** — Charters granted by the legislature to private corporations are in their nature contracts, and any curtailment of the franchises granted is considered an impairment of the obligation of a contract, and hence forbidden by the United States Constitution.[9] If, however, the state has passed a

[1] West River Bridge *v.* Dix, 6 How. 507; Fletcher *v.* Peck, 6 Cranch, 87; Johnson *v.* United States, 8 Ct. of Cl. 243; Young *v.* Mackenzie, 3 Ga. 81.

[2] Frost *v.* Earnest, 4 Whart. 86; Alabama R. R. *v.* Kenney, 39 Ala. 307. The exercise of the right of eminent domain, in condemning the estate of a lessee, does not impair the obligation of the covenant to surrender, or any other covenant in the lease. The covenant to surrender is transferred to the person or corporation acquiring the title. Kip *v.* New York R. R., 67 N. Y. 227. The contract of a railroad company with one telegraph company to allow it the exclusive use of its right of way does not prevent a condemnation of a use of the right of way by another telegraph company. New Orleans Telegraph Co. *v.* Southern Telegraph Co., 58 Ala. 211.

[3] Bailey *v.* Miltenberger, 31 Pa. 37; Dobbins *v.* Brown, 12 Pa. St. 75.

[4] Frost *v.* Earnest, 4 Whart. 86.

[5] Alabama R. R. *v.* Kenney, 39 Ala. 307.

[6] Enfield Bridge Co. *v.* Hartford R. R., 17 Conn. 40.

[7] Bonaparte *v.* Camden R. R., Baldw. 205; Donnaher *v.* Mississippi, 8 Smed. & M. 649.

[8] United States *v.* Illinois Central R. R., 2 Biss. 174. The English act admits of the condemnation of land inalienably settled upon a family by act of Parliament. *In re* Cuckfield Burial Board, 24 L. J. (Ch.) 585.

[9] Dartmouth College *v.* Woodward, 4 Wheat. 518; The State *v.* Noyes, 47

general law declaring that acts of incorporation shall be subject to alteration, amendment, and repeal, this reserves to the legislature the authority to make any alteration or amendment which will not defeat or substantially impair the object of the grant, or any rights under it, which the legislature may deem necessary. Manufacturing corporations, having erected dams, may be compelled to erect fish-ways for the passage of fish, notwithstanding they may have paid compensation for the destruction of private rights of fishery.[1] The privileges granted to municipal corporations in their charters are not in the nature of property, and may be withdrawn by subsequent legislation.[2] Licenses granted to corporations are revocable at the will of the legislature, without damages.[3] The right of selecting a route secured by charter is impaired by a subsequent grant to another company of one of the routes,[4] but where a choice of three routes is given, one not selected may be granted to another company.[5]

§ 39. **Charters not in terms exclusive.** — Charters granting privileges, and not in terms excluding other grants of a similar character, or with terms so general as to comprehend the entire privilege, are not considered as contracts that similar charters shall not be subsequently granted, even if the operation of the subsequent grant is injurious and fatal to the former grant.[6] Charters are to be construed most

Me. 189; where the Legislature endeavored to compel one railroad company to hold its trains at a crossing with another road a certain time, for the arrival of trains. Crenshaw *v.* Slate River Co., 6 Rand. 245.

[1] Holyoke Co. *v.* Lyman, 15 Wall. 500; Commissioners of Fisheries *v.* Holyoke Water-Power Co., 104 Mass. 446.

[2] East Hartford *v.* Hartford Br. Co., 10 How. 511 (reversing *s. c.*, 17 Conn. 79).

[3] Susquehanna Canal Co. *v.* Wright, 9 Watts & S. 9; Richmond Turnpike *v.* Rogers, 1 Duv. 135; Rundle *v.* Delaware Canal Co., 14 How. 80; New York R. R. *v.* Young, 33 Pa. 175; Monongahela Nav. Co. *v.* Coons, 6 Watts & S. 101.

[4] Chesapeake Canal Co. *v.* Baltimore R. R., 4 Gill & J. 1.

[5] Louisville R. R. *v.* Louisville City R. W., 2 Duv. 175.

[6] Turnpike Co. *v.* The State, 3 Wall. 210; The State *v.* Noyes, 47 Me. 189; Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; White River Turnpike Co. *v.*

strongly against the company and in favor of the public.[1] Street-car lines are permitted on the same, or parallel, streets with lines previously authorized by charters not exclusive.[2] A striking instance of construction of a charter in favor of the public is found in the case of Richmond Railroad *v.* Louisa Railroad.[3] The charter granted to the first railroad was to a railroad to run between two points, with a stipulation that no other railroad be chartered for the period of thirty years, the probable effect of which would be to diminish the number of passengers on the railroad. Another railroad was chartered to run between the same points, but the granting of the charter was not considered an impairment of the obligation of the contract, for the reason that it did not appear but that the second road would be used exclusively for merchandise, and not for passengers. An exclusive charter for a horse-railroad does not exclude the construction of a steam-railroad,[4] and *vice versa*.[5]

§ 40. **Legislative contract not to condemn.**—The power of eminent domain is one of the essential incidents of sovereignty, and one legislature cannot contract with a corporation that its property shall not be taken by the exercise of eminent domain. Such provision has no binding force upon a subsequent legislature.[6] There is no such thing as an

Vermont Central R. R., 21 Vt. 590; Sixth Avenue R. R. *v.* Kerr, 45 Barb. 138; Hamilton Avenue, 14 Barb. 405; Mohawk Bridge *v.* Utica R. R., 6 Paige, 554; New York R. R. *v.* Young, 33 Pa. 175; Tuckahoe Canal Co. *v.* Tuckahoe R. R., 11 Leigh, 42; Richmond Turnpike *v.* Rodgers, 1 Duv. 135; Illinois Canal *v.* Chicago R. R., 14 Ill. 314; Dyer *v.* Tuskaloosa Bridge Co., 2 Port. 296; Fuller *v.* Edings, 11 Rich. L. 239.

[1] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Mohawk Bridge *v.* Utica R. R., 6 Paige, 554.

[2] Sixth Avenue R. R. *v.* Kerr, 45 Barb. 138; New York R. R. *v.* Forty-second Street R. R., 50 Barb. 285; Brooklyn City R. R. *v.* Coney Island R. R., 35 Barb. 364.

[3] 13 How. 71.

[4] Louisville R. R. *v.* Louisville City R. W., 2 Duv. 175.

[5] Denver R. W. *v.* Denver City R. W., 2 Col. 673.

[6] Backus *v.* Lebanon, 11 N. H. 19; Proprietors of Locks *v.* Lowell, 7 Gray,

extinction of the right of eminent domain.[1] The use may be changed, notwithstanding the original condemnation devoted the land to a specific purpose forever. The word "forever" would mean until the legislature otherwise directed.[2] A provision in a charter by which the legislature reserved a right to repurchase, does not bind the legislature to purchase rather than to condemn.[3] Lands reserved from sale by constitution or by legislation would be subject to condemnation for public improvements.[4] The contracts or conveyances of a municipal corporation do not prevent a subsequent condemnation of the property.[5] The action of railroad commissioners, approving the abandonment of a railroad depot, is not a contract between the state and the railroad, and the legislature may subsequently reverse the action of the commissioners. The action of the commissioners in approving the proposed change is not such a judgment as to prevent the legislature from nullifying and reversing the approval by taking a different course. Their duties are *quasi* legislative. The discretion which is sometimes exercised by the legislature itself is delegated to the board of commissioners, and the power may be resumed by the legislature, and the course modified, without impairing the obligation of a contract.[6]

§ 41. **Condemnation of the property of a corporation.** — While the legislature may not repeal or materially modify the charter of a corporation, unless the power is

228; Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; The State *v.* Hudson Tunnel Co., 38 N. J. L. 548; Newcastle R. R. *v.* Peru R. R., 8 Ind. 464; Illinois Canal *v.* Chicago R. R., 14 Ill. 314.

[1] New York R. R. *v.* Boston R. R., 36 Conn. 196; Beekman *v.* Saratoga R. R., 3 Paige, 45.

[2] Wellington, petitioner, 16 Pick. 87.

[3] Backus *v.* Lebanon, 11 N. H. 19.

[4] Parmelee *v.* Oswego R. R., 7 Barb. 599; The State *v.* Hudson Tunnel Co., 38 N. J. L. 548.

[5] Brimmer *v.* Boston, 102 Mass. 19.

[6] Connecticut *v.* New Haven Co., 43 Conn. 351.

reserved, the property of the corporation is subject to condemnation for public uses.[1] The taking of the property of a corporation is not an alteration, modification, or repeal of its charter. It is the enforced purchase of its property.[2] The banking-house of a bank, the bridge of a bridge company,[3] the grounds of an academy,[4] may be taken, as well as the property of an individual.[5] The property is held subject to the necessities of the public. The franchise and the property, when inseparable, can be taken together, compensation being made for both.[6] The property of a corporation, not actually in use or absolutely necessary for the enjoyment of the franchise, or which is only convenient, and not such as the corporation might condemn, and which they had acquired by purchase, is subject to condemnation for other purposes, as the property of an individual.[7]

§ 42. **Condemnation of a franchise.**— Franchises are held in subordination to the exercise of eminent domain, and must yield to its proper exercise. The investiture of the franchise is not absolute. Conditions enter into all contracts, superinduced by the preëxisting and higher authority of the laws of nature, of nations, or of the community. There is no distinction between corporeal and incorporeal property, and a franchise is as subject to the power of eminent domain as any other property.[8] There is no impair-

[1] Trustees v. Salmond, 11 Me. 109; Jeffersonville R. R. v. Daugherty, 40 Ind. 88; Illinois Canal v. Chicago R. R., 14 Ill. 314.

[2] Grand Junction R. R. v. Middlesex, 14 Gray, 553; Boston R. R. v. Salem R. R., 2 Gray, 1; The State v. Hudson Tunnel Co., 38 N. J. L. 548.

[3] Charles River Bridge v. Warren Bridge, 11 Pet. 420.

[4] Trustees v. Salmond, 11 Me. 109.

[5] White River Turnpike Co. v. Vermont Central R. R., 21 Vt. 590; Bellona Co.'s Case, 3 Bland, 442.

[6] West River Bridge v. Dix, 6 How. 507, *per* McLean, J.; Crosby v. Hanover, 36 N. H. 404.

[7] Peoria R. R. v. Railroad, 66 Ill. 174; Iron R. R. v. Ironton, 19 Ohio St. 299.

[8] West River Bridge v. Dix, 6 How. 507; Enfield Toll-Bridge Co. v. Hartford R. R., 17 Conn. 40; Backus v. Lebanon, 11 N. H. 19; Central Bridge v.

ment of the obligation of a contract, if, on the condemnation of the entire franchise, or on the authorization of a material injury to it, compensation is made.[1] The provision for compensation recognizes the validity of the contract.[2] There is no greater sacredness in the grant of a franchise to a corporation by legislative power than of a grant to an individual, and such franchises may be taken when the public necessities require it, on making suitable compensation.[3] It must clearly appear that the legislature intended that the franchise should yield to public use, and it should not be taken when the public purpose can otherwise be accommodated.[4] A franchise may be valuable, although the property upon which it is exercised may belong to the public. In condemning such a franchise, the value of the property should not be included.[5] In New Jersey it is suggested that the shares of stock of dissenting stockholders of a corporation may be condemned by the corporation, upon a valuation.[6]

Lowell, 15 Gray, 106; New York R. R. *v.* Boston R. R., 36 Conn. 196; Salem Turnpike *v.* Lyme, 18 Conn. 451; James River Co. *v.* Thompson, 3 Gratt. 270; Tuckahoe Canal Co. *v.* Tuckahoe R. R., 11 Leigh, 42; Lafayette Plank-road *v.* New Albany R. R., 18 Ind. 90; Newcastle R. R. *v.* Peru R. R., 3 Ind. 464.

[1] Richmond R. R. *v.* Louisa R. R., 13 How. 71; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 7 Pick. 344; White River Turnpike *v.* Vermont Central R. R., 21 Vt. 590; Central Bridge *v.* Lowell, 4 Gray, 474; Boston R. R. *v.* Salem R. R., 2 Gray, 1; Matter of Kerr, 42 Barb. 119; Enfield Toll-Bridge Co. *v.* Hartford Bridge, 17 Conn. 454; Baltimore Turnpike *v.* Union R. W., 35 Md. 224.

[2] West River Bridge *v.* Dix, 6 How. 507.

[3] Richmond R. R. *v.* Louisa R. R., 13 How. 71; The State *v.* Canterbury, 28 N. H. 195; Barber *v.* Andover, 8 N. H. 398; Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; West River Bridge *v.* Dix, 16 Vt. 446; Armington *v.* Barnett, 15 Vt. 745; Eastern R. R. *v.* Boston R. R., 111 Mass. 125; Central Bridge *v.* Lowell, 4 Gray, 474; Boston Water-Power Co. *v.* Boston R. R., 23 Pick. 360; Red River Bridge *v.* Clarksville, 1 Sneed, 176.

[4] West River Bridge *v.* Dix, 6 How. 507, *per* Woodbury, J.

[5] Central Bridge *v.* Lowell, 15 Gray, 106. This case contains interesting rules for computation of the compensation for a franchise to determine at a certain time, at which time the property of the corporation was to go to the state.

[6] Black *v.* Delaware Canal Co., 22 N. J. Eq. 130.

§ 43. **Impairment of the enjoyment of a franchise, and regulation of the use of it.** — The enjoyment of an exclusive franchise may be impaired, under legislative sanction, but compensation must be provided.[1] The establishment of a railroad bridge within the exclusive privilege of a toll-bridge is an impairment of the exclusive privilege of a "bridge" within such limits. Although the manner of construction and use may be different, the railroad bridge must be considered "another bridge" within the meaning of the act, although not a similar bridge, and the damages suffered must be assessed and paid.[2] The use of the property of a corporation by the corporation itself is subject to the regulation of the legislature, and such regulation is not a taking of the property for the use of others. A railroad may be compelled to make cattle-guards on the line of the road, to protect the lives of animals and of the travelling public.[3] A railroad may be compelled to build a depot in a certain place, and to cause trains to stop there.[4] This is not a taking of the property of the railroad. The depot, when built, belongs to the company. The legislature may regulate the enjoyment of the franchise by providing for connecting railroads together, and may prescribe by whom, in what manner, and under whose supervision the work should be accomplished, and in what proportion, according to their respective interests, the expenses shall be met by the railroads themselves; and this without compensation, and without regard to the wishes of either corporation.[5] Railroads may be compelled to make wider and better bridges over streets, in order to accommodate public travel,[6] and to

[1] The State *v.* Noyes, 47 Me. 189; Enfield Toll-Bridge *v.* Hartford Bridge Co., 17 Conn. 454; Salem Turnpike *v.* Lyme, 18 Conn. 451.

[2] Enfield Bridge Co. *v.* Hartford R. R., 17 Conn. 40; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420. *Contra*, Lake *v.* Virginia R. R., 7 Nev. 294.

[3] Thorpe *v.* Rutland R. R., 27 Vt. 140.

[4] The Commonwealth *v.* Eastern R. R., 103 Mass. 254.

[5] Fitchburg R. R. *v.* Grand Junction R. R., 4 Allen, 198.

[6] English *v.* New Haven Co., 32 Conn. 240.

make the necessary excavations, embankments, and bridges for new highways.[1] In some states it has been considered too onerous to impose upon railroads and canals the burden of making new crossings and bridges for roads and streets subsequently made, without compensation, while they may be compelled to provide for existing roads and streets.[2]

§ 44. **Condemning a use of the property of a corporation.** — It is not always necessary to condemn the entire property or franchise of a corporation. Two street-cars may be run on the same track as well as one. Two railroad companies may use the same track under proper regulations. The property may still remain in the road having located first, with an easement in the second road to use the track in a proper manner, to be regulated by law.[3] This easement, being a property, must be paid for.[4] In Massachusetts the system has probably been perfected to a greater extent than in any other state. The railroad commissioners have the matter of compensation under their control. The compensation may be limited to the damages for the use and wear of tracks, and may exclude compensation for the diminution of profits or the value of the franchise. Each company has an equal right to use the track.[5] The legislature may require the keeping and rendering of particular accounts, so as to show the amount of business done by one railroad on the track of another.[6] In considering the value

[1] Albany R. R. *v.* Brownell, 24 N. Y. 345 (overruling Miller *v.* New York Central R. R., 21 Barb. 513).

[2] Morris Canal Co. *v.* The State, 24 N. J. L. 62; Illinois Central R. R. *v.* Bloomington, 76 Ill. 447.

[3] Worcester R. R. *v.* Railroad Commissioners, 118 Mass. 561; Sixth Avenue R. R. *v.* Kerr, 45 Barb. 138; Matter of Kerr, 42 Barb. 119; Jersey City & B. R. R. *v.* Jersey City & H. R. R., 20 N. J. Eq. 61; Union R. W. *v.* Continental R. W., Phila. (C. P.) 1876.

[4] Jersey City & B. R. R. *v.* Jersey City & H. R. R., 20 N. J. Eq. 61.

[5] Metropolitan R. R. *v.* Highland R. R., 118 Mass. 290.

[6] Metropolitan R. R. *v.* Quincy R. R., 12 Allen, 262; Lexington R. R. *v.* Fitchburg R. R., 14 Gray, 266.

of the easement taken, it is proper to consider the nature and extent of business transacted by the first railroad, as tending to prove the actual effect of the location on the value of the property taken, but no evidence is admissible as to the damages resulting from inconvenience and interruption.[1] Commissioners may fix the times at which trains shall be run over the road, if not agreed upon between the parties, and may award the right to the condemning company to run a certain number of independent trains over the other's road, and to fix the times when the same shall be run and the stations at which they shall stop, and determine whether the cars shall be run in independent or consolidated trains.[2] The award of rates for carrying passengers and freight may be different from the same station on one road to the junction, when they are to be carried to different stations on the other road.[3] A railroad corporation, across whose road another railroad or a highway is laid out, has the like right as all individuals or bodies corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures on the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travellers crossing the railroad; nor for the expenses of maintaining a flagman, alleged to be necessary to guard against the greater liability to acci-

[1] Boston R. R. v. Old Colony R. R., 3 Allen, 142.
[2] Lexington R. R. v. Fitchburg R. R., 14 Gray, 266.
[3] Boston R. R. v. Western R. R., 14 Gray, 253.

dents occasioned by the obstruction of the view along its railroad, at the crossing of a highway, by means of the abutments of the new railroad of the other corporation.[1] In considering the right of one company to condemn and use the property of another company, it makes no difference as to which is the elder company. If the elder company has exercised its power to condemn property for its right of way, and has constructed and is operating its road, that does not withdraw its property from the equal power of condemnation of its right of way, for a crossing, to be enjoyed in common by a junior company. The right to cross is equal, and does not arise out of purchase. When the younger corporation has acquired its right of property in common with the older in a crossing, they become joint and equal owners, bound by mutual obligations to each other and to the public to so use this common right as to do no unnecessary harm to the other or to the public. It may be provided that all railroad crossings shall be made, kept up, and watchmen maintained at the joint expense of the companies, without regard to the priorities of either in the location and construction of its road. The elder company does not possess any paramount or vested privilege to operate its road over that of the younger. Nor can it impose all the burdens of maintaining this crossing upon the road last constructed. When the appropriation is made, paid for, and put to the new use, both companies stand on a perfect equality as to the rights and privileges in the use of the crossing.[2]

§ 45. **Condemnation of property devoted to another public use.** — Land already taken by the exercise of eminent domain for a public use, and actually used for that purpose, may be taken by legislative authority for other public

[1] Massachusetts R. R. *v.* Boston R. R., 121 Mass. 124; Lake Shore R. W. *v.* Cincinnati R. W., 30 Ohio St. 604; Old Colony R. R. *v.* Plymouth, 14 Gray, 155.

[2] Lake Shore R. W. *v.* Cincinnati R. W., 30 Ohio St. 604.

uses. When so taken, it is presumed that the former use has ceased, or become detrimental,[1] or relatively of less importance.[2] It is not essential that the use for which the property is last taken should be different from the use to which it was first devoted. A turnpike may be condemned for a public highway,[3] and a portion of a railroad may be condemned for the use of another railroad.[4] It is not presumed that roads will be laid lengthwise of a right of way, unless it is shown that no other practical route could be had.[5] An express legislative authority is generally requisite, except where the proposed appropriation would not destroy or greatly injure the franchise, or render it difficult to prosecute the object of the franchise, when a general grant would be sufficient. Railroads entering towns are subject, under the general authority given to towns and counties, to have roads and streets laid across their tracks. The franchise is taken subject to any inconvenience that may arise from such opening.[6] Railroads and canals[7] must allow improvements subsequently authorized to cross or tunnel their rights of way, on reasonable terms[8] and proper compensation.[9] A franchise which is subject to forfeiture is valid until forfeited by some action on the part of the state, and the property of such corporation is still protected by the constitution, and must be paid for according to its proper value.[10]

[1] Miller *v.* Craig, 11 N. J. Eq. 175.

[2] Talbot *v.* Hudson, 16 Gray, 417; Miller *v.* Craig, 11 N. J. Eq. 175.

[3] Barber *v.* Andover, 8 N. H. 398.

[4] Eastern R. R. *v.* Boston R. R., 111 Mass. 125.

[5] Crossley *v.* O'Brien, 24 Ind. 325.

[6] Hannibal *v.* Hannibal R. R., 49 Mo. 480; Enfield Bridge Co. *v.* Hartford R. R., 17 Conn. 40; New Orleans *v.* United States, 10 Pet. 662; Philadelphia R. R. *v.* Philadelphia, 9 Phila. 563; Little Miami R. R. *v.* Dayton, 23 Ohio St. 510.

[7] Illinois Canal *v.* Chicago R. R., 14 Ill. 314.

[8] Richmond R. R. *v.* Louisa R. R., 13 How. 71; Northern R. R. *v.* Concord R. R., 27 N. H. 183; Brooklyn Central R. R. *v.* Brooklyn City R. R., 33 Barb. 420.

[9] Glover *v.* Powell, 10 N. J. Eq. 211.

[10] White *v.* South Shore R. R., 6 Cush. 412.

§ 46. **Express legislative authority.** — To take property already appropriated to another public use, the act of the legislature must show the intent so to do by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting the intent.[1] "It must also appear by the act that they recognize the right of private property, and mean to respect it."[2] An act which provided for assessment of damages to land-owners in laying out roads does not indicate a right to take an easement or franchise which the legislature had previously given,[3] such as laying out a road on a turnpike,[4] or across a public park.[5] Authority to flow land does not include authority to flow a public road.[6] Under a general act authorizing the laying-out of a turnpike, such turnpike could not be laid out the whole length of a railroad.[7] Without special authority, a reservoir cannot be established so as to cover public streets.[8] A general authority to lay out a railroad does not authorize a location over land already devoted to another railroad, or public use. The act must be distinct on that point,[9] unless the route specified necessarily crossed another railroad, turnpike, or canal,[10] when the right to cross would arise by necessary implication.[11] General authority delegated to

[1] The State *v.* Noyes, 47 Me. 189; Worcester R. R. *v.* Railroad Commissioners, 118 Mass. 561; Proprietors of Locks *v.* Lowell, 7 Gray, 223; Boston Water-Power Co. *v.* Boston R. R., 23 Pick. 360; West Boston Bridge *v.* Middlesex, 10 Pick. 270; Bridgeport *v.* New York R. R., 36 Conn. 255; Matter of Ninth Avenue, 45 N. Y. 729; Manhattan Co., *ex parte*, 22 Wend. 658; Commissioners of Central Park, 63 Barb. 282; Hickok *v.* Hine, 23 Ohio St. 523; Hatch *v.* Cincinnati R. R., 18 Ohio St. 92; Matter of City of Buffalo, 68 N. Y. 167; Milwaukee R. R. *v.* Faribault, 23 Minn. 167.

[2] Shaw, C. J., in Boston R. R. *v.* Salem R. R., 2 Gray, 1.

[3] Barber *v.* Andover, 8 N. H. 398.

[4] West Boston Bridge *v.* Middlesex, 10 Pick. 270.

[5] Wellington, petitioner, 16 Pick. 87.

[6] The Commonwealth *v.* Stevens, 10 Pick. 247.

[7] Bridgeport *v.* New York R. R., 36 Conn. 255.

[8] Manhattan Co., *ex parte*, 22 Wend. 653.

[9] Housatonic R. R. *v.* Lee R. R., 118 Mass. 391.

[10] Tuckahoe Canal *v.* Tuckahoe R. R., 11 Leigh, 42.

[11] The State *v.* Easton R. R., 36 N. J. L. 181; Morris R. R. *v.* Central R. R.,

a city council cannot be exercised in the condemnation of property of the state devoted to public purposes.[1] If the powers of the subsequent charter can, by reasonable intendment, be exercised without the appropriation of property already actually held and used for another public use, it must be done. The legislature is not presumed to have abandoned the former use, and turned over the property to the later use, without clear and unmistakable expression of that intention. Lands held for purposes of public parks,[2] reservoirs,[3] or institutions[4] for the blind cannot be taken for railroad purposes, even though the railroad company was authorized to take for its route all lands necessary belonging to the state.[5]

Under a general authority to condemn lands for streets, a street may be laid out across a railroad, but not longitudinally on the railroad track. Under general laws, property cannot be taken where the appropriation will destroy or impair the exercise of the franchises of another corporation, unless the power to take is given in express terms, or arises from a necessary implication. The right to lay a street across a railroad track arises from a necessary implication. Under the condemnation of a right to cross, nothing is acquired but a mere right of way, and the place of crossing will remain in common use of the parties for the exercise of their several franchises. But where the use for which the condemnation is prosecuted is of such a character as necessarily to require for its enjoyment the exclusive possession and occupation of the premises, it is manifest the condemnation will be utterly futile, unless it may operate also to extinguish the right of the corporation, whose title is con-

31 N. J. L. 205; Baltimore Turnpike *v.* Union R. R., 35 Md. 224; Atlantic R. R. *v.* Mann, 43 Ga. 200; Newcastle R. R. *v.* Peru R. R., 3 Ind. 464.

[1] Mayor *v.* Central R. R., 53 Ga. 120.

[2] *In re* Boston R. R., 53 N. Y. 574.

[3] The State *v.* Mont Clair R. W., 35 N. J. L. 328.

[4] St. Louis R. R. *v.* Blind Institution, 43 Ill. 303.

[5] *Ibid.*

demned, to use the lands for its corporate purposes. The power to invade the privileges of a corporation in such a manner will not be inferred from a naked grant of the power to condemn.[1]

In the case Matter of the City of Buffalo,[2] the definition of implication is given, and the construction which must be placed on statutes claimed to confer power by implication. The court say: "An implication is an inference of something not directly declared, but arising from what is admitted or expressed. In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded by the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use, when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that, by reasonable intendment, some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." The City

[1] New Jersey R. R. v. Long Branch Commissioners, 39 N. J. L. 28.
[2] 68 N. Y. 167.

of Buffalo proposed to excavate a canal sixty feet in width across the tracks of several railroads, and entirely through the yard of one of them, at a place where there are numerous tracks, turn-outs, and switches. The present grade of these tracks was but a few feet above the natural level of the canal. The land, if taken by the city, would be taken in fee, and hence the railroad companies would have no right to bridge the canal, and the bridging, if done, would be at an immense expense. This interference, the court say, would not be a tolerable interference with an existing public use, which may be compensated for in damages, but an entire superseding of it by another public use. Both uses cannot stand together. It is not to be presumed that the legislature, by the general terms in which it gave power to the city to take lands, with no especial reference to this particular place or occasion, meant to produce such an effect.[1] A general authority to lay out streets and alleys will not justify the laying-out of a street across depot grounds when the easement of the railroad company and of the city cannot reasonably coexist.[2]

§ 47. **Condemnation under general laws of property devoted to another public use — Priority of location.** — In many states, the granting of special charters and special privileges to private corporations has ceased. The condemnation of private property for public use is governed by general laws. No restriction on routes is imposed by the acts, and conflicts have frequently arisen. Land already devoted to another public use cannot be taken, under general laws, where the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained;[3] or if

[1] Matter of City of Buffalo, 68 N. Y. 167.

[2] Milwaukee R. R. v. Faribault, 23 Minn. 167.

[3] New York R. R. v. Metropolitan Gas-Light Co., 63 N. Y. 326; Morris R. R. v. Central R. R., 31 N. J. L. 205.

the property sought to be condemned was not in use, or absolutely necessary to the enjoyment of the franchise.[1] Property abandoned by a former corporation may be taken. The taking is not a forfeiture of the franchise, for the state alone can declare such forfeiture; but the land may be taken because not necessary to the old corporation, and because one company cannot condemn and hold land not necessary or convenient for its business, merely to prevent a rival company from competing with it.[2] A portion of a horse-railroad which constitutes the most valuable portion of the road cannot be condemned under a general law. A crossing may properly be made, but the condemnation should be of the whole road, and not of the most valuable portion of it.[3] When different corporations desire the same location, the one that is prior in point of time is also prior in point of right, and the first location, if followed by construction, operates to secure the prior right.[4] Unless an exclusive right is given to a particular route, the company which files the first survey is entitled to the route. It does not signify that the articles of incorporation of one are prior in date to those of the other, or that one has made preliminary surveys over a particular route, or has made purchases of individuals along that route. Until the survey is made and filed, the company would hold the land purchased as any other individual land-owner, and such land could be

[1] Peoria R. R. *v.* Railroad, 66 Ill. 174; Oregon R. R. *v.* Bailey, 8 Oreg. 164. A corporation, either private or municipal, cannot, under a general power to take lands for a public use, take from another corporation, having the like power, lands or property held by it for a public purpose pursuant to its charter. But an easement may be acquired *in invitum*, by legislative authority, in lands held and occupied for a public use, when such easement may be enjoyed without detriment to the public or interfering with the use to which the lands are devoted. Lands held simply as a proprietor, but not used or necessary to the public purpose, may be taken as of a private person. Matter of Rochester Water Commissioners, 66 N. Y. 413.

[2] Oregon R. R. *v.* Bailey, 8 Oreg. 164.

[3] Central Horse R. R. *v.* Ft. Clark Horse R. R., 81 Ill. 523.

[4] Waterbury *v.* Dry Dock R. R., 54 Barb. 388; The People *v.* New York R. R., 45 Barb. 73.

condemned by the rival company upon compensation.[1] The priority of construction gives no rights where another company has perfected its location first.[2] A right of way taken and occupied by one road cannot be taken by another, by a general proceeding, without stating in the petition that the land was occupied by another company, and without showing any necessity for taking that particular land.[3] The commissioners who assess the damages cannot determine the priority of right,[4] nor can the owner raise questions of priority between the two companies claiming the land, under separate proceedings, to defeat condemnation.[5]

[1] Morris R. R. v. Blair, 9 N. J. Eq. 635.

[2] Titusville R. R. v. Warren R. R., — Pa. — (1872); Chesapeake Canal Co. v. Baltimore R. R., 4 Gill & J. 1.

[3] Cincinnati R. R. v. Danville R. R., 75 Ill. 113; San Francisco Water Co. v. Alameda Water Co., 36 Cal. 639.

[4] San Francisco Water Co. v. Alameda Water Co., 36 Cal. 639.

[5] Lake Merced Water Co. v. Cowles, 31 Cal. 215.

CHAPTER VI.

EXTENT OF AUTHORITY TO CONDEMN.

§ 48. Authority to condemn not presumed.
49. Extent of interest condemned.
50. A fee may be condemned.
51. Fee in public roads and streets.
52. Minerals in land taken for street.
53. Timber and grass in highways.
54. Materials and buildings in highway.
55. Public use of a highway — Construction of sewers, drains, markets, etc.
56. Use of highway by adjoining owner.
57. Cessation of public use — Reversion to owner.
58. Power exhausted by one exercise — Limitations as to time and amount.
59. Necessary and convenient buildings — Maintenance — Repairs — Side tracks, telegraph lines, etc.

§ 48. Authority to condemn not presumed. — The act authorizing condemnation must be express and clear. If there are doubts as to the extent of the power, after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to the claim of power.[1] Although a corporation may be engaged on a great public work, in which the power of condemnation would be of great service, yet the authority must be clearly conferred. Otherwise the corporation must purchase from the owners as best they can.[2] A city, by reason of its general control over streets, is not authorized to impose a new use on streets.[3] An act authorizing a city to construct and regu-

[1] New York R. R. *v.* Kip, 46 N. Y. 546; Webb *v.* Manchester & Leeds Rail. Co., 4 Myl. & Cr. 116.

[2] Thacher *v.* Dartmouth Bridge Co., 18 Pick. 501; President, etc., of Brooklyn *v.* Patchen, 8 Wend. 47; Grand Rapids Co. *v.* Jarvis, 30 Mich. 303; Stein *v.* Burden, 24 Ala. 130.

[3] The State *v.* Trenton, 36 N. J. L. 79. Authority to make and control streets does not include a right to make parks. Rader *v.* Township of Union, 39 N. J. L. 509.

late sewers, drains, and cisterns does not confer power to condemn private property for sewers and drains.[1] Authority to condemn lands for streets, alleys, highways, and squares does not confer power to condemn land for a city prison.[2] A charter to construct a public improvement, such as a boom, confers no power to condemn or injure lands without the consent of the owner.[3] Authority to condemn for the construction of railroads, canals, and bridges cannot be extended to owners of ferries. Such rights only exist by force of legislative enactment, and are limited to the persons and purposes named; and it does not change the principle that the benefits from bridges and ferries are similar.[4] If particular property is specified as subject to condemnation, all other property is excluded by implication. Authority to lay out a road through uncultivated lands, or through cultivated lands, when demanded by twelve freeholders, does not authorize the laying-out through mills, manufactories, or yards connected therewith.[5]

§ 49. **Extent of interest condemned.** — Although the propriety of the condemnation cannot be questioned by the courts, yet the extent is, in a degree, subject to their control. There is no sacredness in a building over land, so that the building may not be taken under the authority to take "land." The word "land" includes all improvements on the same, such as buildings,[6] bridges,[7] etc. Personal property,[8] necessary materials,[9] and supplies of water[10] may be condemned. An abuse of the power, whereby an amount

[1] Allen *v.* Jones, 47 Ind. 488.
[2] East St. Louis *v.* St. John, 47 Ill. 463.
[3] Grand Rapids Co. *v.* Jarvis, 30 Mich. 308.
[4] Sandford *v.* Martin, 31 Iowa, 67.
[5] Clark *v.* Phelps, 4 Cow. 190.
[6] Peirce *v.* Somersworth, 10 N. H. 369; Ferree *v.* School District, 76 Pa. 876; Brocket *v.* Ohio R. R., 14 Pa. 241.
[7] Smith *v.* Conway, 17 N. H. 586.
[8] Canal Co. *v.* Commissioners of Drainage, 26 La. An. 740.
[9] Jerome *v.* Ross, 7 Johns. Ch. 315.
[10] Strohecker *v.* Alabama R. R., 42 Ga. 509.

is condemned greater than can be reasonably required for the public use, is subject to the correction of the courts, and the construction will be against extending the power. No more is to be taken than is necessary for the accomplishment of the public object, and if the language of the act admits of a construction which will leave a fee in the owner, subject to the public easement, it will be so construed.[1] The use of the words "lay out" import the taking of an easement, and not of a fee; and this construction is not qualified by a further enactment barring any action for possession or damages, after the laying-out.[2] A right in a company to "be seized and possessed of the land" does not necessarily require a fee to be taken.[3] Property may be taken for such time as is necessary in order to carry out the end desired, and the compensation should be based upon the length of the use and the damage to the owner.[4] The public cannot be compelled to take a fee when a temporary use or easement will suffice.[5] The use of land required for railroads,[6] roads, streets, and alleys[7] is that

[1] New York R. R. *v.* Kip, 46 N. Y. 546; *s. c.*, 18 N. Y. Sup. Ct. 24; Appointment of Viewers, Wyoming Common Pleas, 4 Leg. Gaz. 410; Heyneman *v.* Blake, 19 Cal. 579. In Washington Cemetery *v.* Prospect Park R. R., 68 N. Y. 591, the court say: "The Legislature determines the estate or interest to be taken. No implication ought to be indulged that a greater interest or estate is taken than is absolutely necessary to satisfy the language and object of the statute making the appropriation. Authority to take land for an avenue does not require a taking in fee. The purpose is fully satisfied by the taking of an easement. There is nothing inconsistent in the public use of the land for an avenue and the retention by the land-owners of the fee, subject to the easement. It is not necessary that exact or technical language should be used in a statute for taking private property for public use, in order to vest the fee in the public, but it must clearly appear, before this effect can be given to a statute, that it was the intention of the Legislature, disclosed by the act itself, to take a fee."

[2] United States *v.* Harris, 1 Sumn. 21.

[3] Quimby *v.* Vermont Central R. R., 28 Vt. 887.

[4] Lynch *v.* Stone, 4 Denio, 356.

[5] Jerome *v.* Ross, 7 Johns. Ch. 315.

[6] Henry *v.* Dubuque R. R., 2 Iowa, 288; Alabama R. R. *v.* Burkett, 42 Ala. 83.

[7] Paul *v.* Detroit, 32 Mich. 108; Commissioners of Shawnee County *v.* Beckwith, 10 Kan. 603.

of a perpetual easement, and a fee cannot be taken unless directed by the statute. An entire lot cannot be taken unless the public use require the entire lot.[1] The company, if authorized, cannot be controlled in the exercise of discretion, and may condemn land although held by it under lease,[2] or already occupied by it.[3]

The English Lands Clauses Consolidation Act provides for the temporary use of adjoining property and of private roads, when the same becomes necessary in constructing a railroad, and compensation is to be paid for the temporary use.[4] If the private road is so obstructed as to render it impassable for, or dangerous or extraordinarily inconvenient to, passengers or other persons, or carriages, the company is required, before the commencement of construction, to open a sufficient road in lieu of the one so obstructed.[5] After the conclusion of the construction, the old road is to be restored or a new road substituted.[6] Under sections 128, 129, and 130 of the act, the owners of lands condemned have a right of preëmption as to all lands condemned which are in excess of the needs of the company.

§ 50. **A fee may be condemned.** — It is the exclusive province of the legislature to determine the degree and

[1] Chesapeake Canal *v.* Mason, 4 Cranch C. Ct. 123; Commissioners of Central Park, 51 Barb. 277, qualifying South Seventh Street, 48 Barb. 12. The owner may consent to the taking, or statutes may allow the owner who is dissatisfied with an assessment of the expense of raising the grade of his land to give notice, and require the city to take his land. These statutes would apply to the case of a tenant in common (Leavitt *v.* Cambridge, 120 Mass. 157), or the owner of an equity of redemption. Farnsworth *v.* Boston, 121 Mass. 173. The difficulties should not militate against the rights of the owners. The statutes are intended to give the owner the privilege of electing whether he would pay the expense of filling his land and retain his estate, or surrender his estate to the public for a fair compensation.

[2] New York R. R. *v.* Kip, 46 N. Y. 546; *s. c.*, 13 N. Y. Sup. Ct. 24; Appointment of Viewers, Wyoming Common Pleas, 4 Leg. Gaz. 410.

[3] Coster *v.* New Jersey R. R., 24 N. J. L. 730; Harrisburg *v.* Crangle, 3 Watts & S. 460.

[4] 8 Vict., c. 20, § 80.

[5] *Ibid.*, § 81.

[6] *Ibid.*, § 56.

quality of interest which may be taken from an individual, as well as the necessity of taking it. An easement or usufruct may be taken, or the entire property may be taken, so as to be vested absolutely,[1] without reversion to the original owner in case of a change in the use.[2] In such cases the owner is paid the entire value of the land, and should have no reversion.[3] When only an easement is taken, it is presumed that the full value is not given and that the owner receives a lesser amount, when there is reserved to him the chance of reversion on a discontinuance of the public use. When the full value has been paid, the land, with all the materials thereon, belongs to the public;[4] there is no right of easement remaining in the owner,[5] and the land so taken may be sold for other purposes.[6] Land taken originally for an almshouse or hospital may, after years of increase in the population of a city, become unsuitable for such purposes, and may be sold by the public.[7] Otherwise the owner, having received the full value of his land, might either compel the public to continue a public institution in an unsuitable place, or receive, in addition to the value of

[1] Chesapeake Canal v. Union Bank, 4 Cranch C. Ct. 75; Dingley v. Boston, 100 Mass. 544; Hingham Bridge v. Norfolk, 6 Allen, 353; Water Commissioners v. Lawrence, 3 Edw. Ch. 552; Attorney-General v. Turpin, 3 Hen. & M. 548; Raleigh R. R. v. Davis, 2 Dev. & B. 451; The State v. Evans, 3 Ill. 208; Cotton v. Boom Co., 22 Minn. 372; Challiss v. Atchison R. R., 16 Kan. 117.

[2] De Varaigne v. Fox, 2 Blatchf. 95; Brooklyn Park v. Armstrong, 45 N. Y. 234; Rexford v. Knight, 11 N. Y. 308; Heyward v. Mayor of New York, 7 N. Y. 314; Robinson v. West Pennsylvania R. R., 72 Pa. 316; Wyoming Coal Co. v. Price, 81 Pa. 156 (1876); Craig v. Mayor, 53 Pa. 477; Water-Works Co. v. Burkhart, 41 Ind. 364; Winona R. R. v. Denman, 10 Minn. 267; Challiss v. Atchison R. R., 16 Kan. 117; Nelson v. Fleming, 56 Ind. 310 (1877).

[3] Brooklyn Park v. Armstrong, 45 N. Y. 234; Heyward v. Mayor of New York, 7 N. Y. 314 (overruling The People v. White, 11 Barb. 26); Water-Works Co. v. Burkhart, 41 Ind. 364.

[4] Baker v. Johnson, 2 Hill, 342.

[5] Water-Works Co. v. Burkhart, 41 Ind. 364 (overruling Edgerton v. Huff, 26 Ind. 35).

[6] Haldeman v. Pennsylvania R. R., 50 Pa. 425; Water-Works Co. v. Burkhart, 41 Ind. 364. Doubted in Malone v. Toledo, 28 Ohio St. 648.

[7] De Varaigne v. Fox, 2 Blatchf. 95.

his land, the erections made on it.[1] Lands so taken may be sold on execution against the corporation owning it.[2] If the act provided that full value should be given for the land, and that the land so taken should be pledged to secure park bonds, it must be inferred that a fee was to be taken.[3] In the full value which is to be given for the land there should be no allowances made for benefits and advantages. That would indicate that there would be a reversion.[4] When the state takes land for its own purposes, it is presumed to take in fee.[5]

§ 51. **Fee in public roads and streets.** — Although the fee in land may be taken by legislative authority, the general rule is that, subject to the easement of the public, the fee of land taken for roads and streets is in the owner of the adjoining soil,[6] and upon the discontinuance of the highway or street, the soil and freehold revert to the adjoining owner.[7] Should the streets and adjoining land be both condemned for purposes other than a street, — as, for a park or navy-yard, — compensation must be made for both.[8] On a discontinuance and reversion of the land, the public cannot recover back the money paid. The owner cannot be

[1] Heyward *v.* Mayor of New York, 7 N. Y. 314.

[2] The State *v.* Rives, 5 Ired. 297.

[3] Brooklyn Park *v.* Armstrong, 45 N. Y. 234.

[4] Kellogg *v.* Malin, 50 Mo. 496.

[5] Craig *v.* Mayor, 53 Pa. 477; Nelson *v.* Fleming, 56 Ind. 310.

[6] Williams *v.* Natural Bridge Plank-Road, 21 Mo. 580; Barclay *v.* Howell's Lessee, 6 Pet. 498; Gidney *v.* Earl, 12 Wend. 98; Rogers *v.* Bradshaw, 20 Johns. 735; Higbee *v.* Camden R. R., 19 N. J. Eq. 276; Nicholson *v.* Stockett, Walk. (Miss.) 67; Cox *v.* Louisville R. R., 48 Ind. 178 (qualifying New Albany R. R. *v.* O'Daily, 13 Ind. 353); Vaughn *v.* Stuzaker, 16 Ind. 338; Overman *v.* May, 35 Iowa, 89; Small *v.* Pennell, 31 Me. 267; Town of Old Town *v.* Dooley, 81 Ill. 255.

[7] Brown *v.* Freeman, 1 Root (Conn.) 118; Buel *v.* Clark, 1 Root (Conn.), 49; Jackson *v.* Hathaway, 15 Johns. 447; Whitbeck *v.* Cook, 15 Johns. 488; Phillips *v.* Dunkirk R. R., 78 Pa. 177; Mendez *v.* Dugart, 17 La. An. 171; Hatch *v.* Arnault, 3 La. An. 482; Taylor *v.* Armstrong, 24 Ark. 102; Morris *v.* Turnpike Road, 6 Bush, 671; San Francisco *v.* Water-Works, 48 Cal. 493.

[8] Riverside Park, 61 Barb. 40; Harris *v.* Elliott, 10 Pet. 25.

compelled to repurchase the easement at any price.[1] The presumption always is that the fee of highways is in the adjoining owner,[2] and the profits thereof, consistent with the existence of the easement, remain in the original owner.[3] A portion of a street[4] or railroad[5] discontinued reverts. The fee of streets in the city[6] of New York is in the city; and in Kansas, in the county[7] where situated. The Roman law held the title of abandoned roads to be still in the public.[8]

§ 52. **Minerals in land taken for street.** — The minerals found below the bed of the road, the excavation of which is not necessary for the construction of the road, belong to the owner of the soil.[9] The adjoining owner is entitled to the stone[10] in the streets, the gypsum[11] under the highways, and to the mines.[12] In the construction of streets and highways, the authorities may remove, but not use, such materials.[13] The owner may work the mines under the road in such a manner as not to interfere with the public use.[14] The use

[1] Westbrook *v.* North, 2 Me. 179; Hampton *v.* Coffin, 4 N. H. 517; Nicholson *v.* Stockett, Walk. (Miss.) 67.

[2] Copp *v.* Neal, 7 N. H. 275.

[3] Tucker *v.* Eldred, 6 R. I. 404.

[4] John and Cherry Streets, 19 Wend. 659.

[5] Louisville R. R. *v.* Covington, 2 Bush, 526.

[6] The People *v.* Kerr, 27 N. Y. 188; *s. c.*, 38 Barb. 369; 37 Barb. 357.

[7] Smith *v.* Leavenworth, 15 Kan. 81.

[8] Hatch *v.* Arnault, 3 La. An. 482; Mitchell *v.* Bass, 33 Texas, 259.

[9] Barclay *v.* Howell's Lessee, 6 Pet. 498; Blake *v.* Rich, 34 N. H. 282; Tucker *v.* Eldred, 6 R. I. 404; Woodruff *v.* Neal, 28 Conn. 165; Jackson *v.* Hathaway, 15 Johns. 447; Winter *v.* Peterson, 24 N. J. L. 524.

[10] Fisher *v.* Rochester, 6 Lans. 225; Smith *v.* Rome, 19 Ga. 89; Overman *v.* May, 35 Iowa, 89.

[11] The People *v.* Eldredge, 10 N. Y. Sup. Ct. 541.

[12] Bolling *v.* Mayor, 3 Rand. 563.

[13] Smith *v.* Rome, 19 Ga. 89.

[14] West Covington *v.* Freking, 8 Bush, 121; Dubuque *v.* Benson, 23 Iowa, 248; Fletcher *v.* Great Western Rail. Co., 29 L. J. (Exch.) 253; Midland Rail. Co. *v.* Checkley, 36 L. J. (Ch.) 880; L. R. 4 Eq. 19; Stourbridge Canal Co. *v.* Earl of Dudley, 30 L. J. (Q. B.) 108.

of the stone in the highway, for repairing the highway, is considered admissible;[1] but it cannot be quarried for the purpose of constructing a bridge, although the stone is taken from the bed of the river under the proposed bridge.[2] The English Lands Clauses Consolidation Act makes elaborate provision for supervision of the working of mines under railways, so that the railroad company shall not be injured in its property by the unsafe and improper working of the mines.[3] The compensation to the owner should include all damages to the owner occasioned by the fact that he may be prevented from removing the minerals under the right of way.[4] There is a distinction between "minerals" which are properly dug out of the earth by means of a mine having a roof overhead, and materials quarried out where there is no roof.[5]

§ 53. **Timber and grass in highways.** — The timber and grass found in public highways belong to the owner of the adjoining soil.[6] In order to make the road passable, it may be necessary for the authorities to cut down trees found in the road; but the trees thus cut down belong to the owner,[7] and should be removed to a convenient distance for the use of the owner.[8] The public require a right of passage, and

[1] Evans v. Haefner, 29 Mo. 141; Chapin v. Sullivan R. R., 39 N. H. 564.

[2] Overman v. May, 35 Iowa, 89.

[3] 8 Vict., c. 20, §§ 78, 79, 80, 81, 82, 83. The company may enter and inspect the mines. Bennitt v. Whitehouse, 29 L. J. (Ch.) 826.

[4] Barnsley Canal Co. v. Twibell, 13 L. J. (Ch.) 434; Proud v. Bates, 34 L. J. (Ch.) 406; Fletcher v. Great Western Rail. Co., 29 L. J. (Exch.) 258.

[5] Davvell v. Roper, 24 L. J. (Ch.) 779; Micklethwait v. Winter, 20 L. J. (Exch.) 313; Bell v. Wilson, 13 W. R. 708; 35 L. J. (Ch.) 337.

[6] Barclay v. Howell's Lessee, 6 Pet. 498; Adams v. Emerson, 6 Pick. 57; Tucker v. Eldred, 6 R. I. 404; Woodruff v. Neal, 28 Conn. 165; Jackson v. Hathaway, 15 Johns. 447; Niagara Co. v. Bachman, 4 Lans. 523; Sanderson v. Haverstick, 8 Pa. 294; Chambers v. Furry, 1 Yeates, 167; Bolling v. Mayor, 8 Rand. 563; Phifer v. Cox, 21 Ohio St. 248.

[7] Blake v. Rich, 34 N. H. 282.

[8] Baker v. Shephard, 24 N. H. 208; Makepeace v. Worden, 1 N. H. 16; Niagara Co. v. Bachman, 4 Lans. 523; Reynolds v. Speers, 1 Stew. 34.

do not require the use of the timber taken off, although it may be necessary to remove the same.[1] It is a trespass for officers to cut down trees not obstructing the highway,[2] or to use the timber found on the land for any purpose,[3] or for repairing the road.[4] Trover may be maintained against a stranger cutting trees.[5] In some of the states, the use of the trees in the highway for the purpose of repairing and constructing the way is sustained.[6] Trees may be cut down for a site to erect a toll-house.[7] Trees in the highway, useful for shade, may be cut down by the adjoining owner. The penalties for injuring shade-trees do not apply to owners of the soil.[8] The grass in a highway may be cut down in order to make a highway passable, but it would constitute a trespass *ab initio* to carry off, use, or pasture the grass.[9] A legislative act allowing others to depasture grass in the road in front of land belonging to adjoining proprietors would be placing an additional burden on the land, and would be void if compensation were not provided.[10] In New York, the right of pasturage in highways is supported by ancient usage, and because compensation is made on the basis of such well-known use.[11] A hedge-fence in a road belongs to the adjoining owner, and he may remove it and transplant it so as to conform to the new line of the road.[12] A hedge which overruns the highway may be trimmed by

[1] Tucker *v.* Eldred, 6 R. I. 404; Lancaster *v.* Richardson, 4 Lans. 136.
[2] Winter *v.* Peterson, 24 N. J. L. 524.
[3] Baker *v.* Shephard, 24 N. H. 208; Deaton *v.* Polk County, 9 Iowa, 594.
[4] Niagara Co. *v.* Bachman, 4 Lans. 528; Reynolds *v.* Speers, 1 Stew. 84.
[5] Sanderson *v.* Haverstick, 8 Pa. 294.
[6] Cole *v.* Drew, 44 Vt. 49; Deaton *v.* Polk County, 9 Iowa, 594; Prather *v.* Ellison, 10 Ohio, 896.
[7] Tucker *v.* Tower, 9 Pick. 109.
[8] Lancaster *v.* Richardson, 4 Lans. 136.
[9] Stackpole *v.* Healy, 16 Mass. 33; Woodruff *v.* Neal, 28 Conn. 165.
[10] Woodruff *v.* Neal, 28 Conn. 165.
[11] Hardenburgh *v.* Lockwood, 25 Barb. 9; Griffin *v.* Martin, 7 Barb. 297.
[12] Commissioners of Shawnee Co. *v.* Beckwith, 10 Kan. 603.

an officer, but it is a trespass on the part of any other party.[1]

§ 54. **Materials and buildings in highway.** — The materials, earth, and gravel found in the roadway may be used in constructing and repairing the way,[2] and the bridges,[3] which are parts of the way; and materials may be taken from one point, where there is an excess, to another point, where there is a deficiency.[4] The owner may be enjoined from removing from the road materials necessary for the construction and repair of the road.[5] Materials already separated from the soil, for other uses, cannot be taken and used for roads subsequently located.[6] If the materials in the street, which must be removed, are not desired by the owner, the authorities may sell the same, and maintain an action for the contract price of such materials against the purchaser.[7] The materials in buildings on land which has been taken for a street may be claimed by the owner. The public do not need the materials in the house, and the owner would not be compensated for the value of the materials in the house. This would not be making part of

[1] Phifer *v.* Cox, 21 Ohio St. 248.

[2] Troy *v.* Cheshire R. R., 23 N. H. 83; Cole *v.* Drew, 44 Vt. 49; Higgins *v.* Reynolds, 31 N. Y. 151; Jackson *v.* Hathaway, 15 Johns. 447; Fish *v.* Rochester, 6 Paige, 268; Niagara Co. *v.* Bachman, 4 Lans. 523.

[3] Felch *v.* Gilman, 23 Vt. 38. The removal of rock from a street, in order to construct the street, or to construct a bridge, may properly be done by the public, or by a contractor with the city for that purpose, and he may use the materials in the construction of the street or bridge. Notwithstanding this, the contractor may make a valid contract to pay for the material at a certain rate. St. Anthony Falls Co. *v.* King Bridge Co., 23 Minn. 186.

[4] Delphi *v.* Evans, 36 Ind. 90; Bissell *v.* Collins, 28 Mich. 277 (qualifying Cuming *v.* Prang, 24 Mich. 514). The earth must be removed in improving the street, and not simply to furnish earth for filling other streets. Mayor of Macon *v.* Hill, 58 Ga. 595.

[5] New Haven *v.* Sargent, 38 Conn. 50.

[6] Higgins *v.* Reynolds, 31 N. Y. 151.

[7] Griswold *v.* Bay City, 35 Mich. 452. This case, when published in 4 Cent. L. J., was accompanied by a valuable note, collecting the authorities.

the compensation for property taken in materials.[1] In an ordinary taking, the materials of buildings are condemned as well as the land. The owner could not be compelled to take the materials and remove them.[2]

§ 55. **Public use of a highway — Construction of sewers, drains, markets, etc.** — The power of the public over a highway is not confined to travel only, but the public may construct drains, sewers, gutters, water-pipes, cisterns, wells,[3] and reservoirs in highways.[4] Such use is necessary to carry off surplus water, and to provide water for sprinkling and cleansing streets, and for extinguishing fires.[5] The right to lay gas-pipes in a country highway is not such an use of the highway as was contemplated at the time of the condemnation.[6] There is a greater variety in the uses to which city streets are put than in those to which public highways in the country are put,[7] and in a city street the laying of gas-pipes would probably be considered legitimate.[8] The original compensation paid is supposed to cover damages for all such uses,[9] and in case of a dedication of the street, the owner is presumed to have contemplated such use.[10] The public is entitled to the use of the entire highway, and may widen the portion used so as to cover the entire highway as laid out.[11] A toll-house and dwelling for the toll-keeper may be erected on the land used as a road, and a cellar and well may be provided for the use of

[1] Dorgan *v.* Boston, 12 Allen, 223.

[2] Schuchardt *v.* New York, 53 N. Y. 202.

[3] Memphis *v.* Water Co., 5 Tenn. 495; Warren *v.* Grand Haven, 30 Mich. 24.

[4] Barter *v.* The Commonwealth, 3 Pen. & Watts, 259.

[5] West *v.* Bancroft, 32 Vt. 367; Boston *v.* Richardson, 13 Allen, 146; Cone *v.* Hartford, 28 Conn. 363; Kelsey *v.* King, 32 Barb. 410.

[6] Bloomfield Gas Co. *v.* Calkins, 62 N. Y. 386; *s. c.*, 1 N. Y. Sup. Ct. 541 (qualifying Bloomfield Gas Co. *v.* Richardson, 63 Barb. 437).

[7] Kelsey *v.* King, 32 Barb. 410; Milhan *v.* Sharp, 15 Barb. 193.

[8] The People *v.* Bowen, 30 Barb. 24.

[9] Boston *v.* Richardson, 13 Allen, 146; Cone *v.* Hartford, 28 Conn. 363.

[10] Warren *v.* Grand Haven, 30 Mich. 24.

[11] Munson *v.* Mallory, 36 Conn. 165.

the toll-keeper, but such house must be confined to the uses of the road and the collection of tolls.[1] An ordinance establishing a market in a public street is an additional burden. The occupation of the street by market-wagons standing continually is an obstruction to the street, and operates to depreciate the value of property, and hence no such occupation can be justified without payment of compensation.[2] The public may occupy a portion of the street with a statue.[3]

§ 56. **Use of highways by adjoining owner.** — All use of property condemned which is not inconsistent with the enjoyment of the public easement remains with, and may be enjoyed by, the owner.[4] He may maintain ejectment for an adverse occupation,[5] or for occupying it with a structure,[6] even if such structure is on the portion of the highway which abuts upon a river.[7] His interest is such that he may maintain trespass for its obstruction,[8] or for ploughing up the road, when not done in the course of repairing it,[9] or for depositing rails on the highway,[10] or for occupying it as a ferry-landing.[11] He may sink a water-course below it, covering it so that the highway remains safe and convenient, and the public must continue his water-courses, whether

[1] Tucker *v.* Tower, 9 Pick. 109; Ward *v.* Turnpike Co., 6 Ohio St. 15; Ridge Turnpike Co. *v.* Stoever, 6 Watts & S. 378. *Contra*, The State *v.* Laverack, 34 N. J. L. 201 (overruling Wright *v.* Carter, 27 N. J. L. 76).

[2] The State *v.* Laverack, 34 N. J. L. 201.

[3] Tompkins *v.* Hodgson, 9 N. Y. Sup. Ct. 146.

[4] Kane *v.* Baltimore, 15 Md. 240.

[5] Perley *v.* Chandler, 6 Mass. 454; Read *v.* Leeds, 19 Conn. 182; Taylor *v.* Armstrong, 24 Ark. 102.

[6] Peck *v.* Smith, 1 Conn. 103.

[7] Bingham *v.* Doane, 9 Ohio, 165.

[8] Barclay *v.* Howell's Lessee, 6 Pet. 498; Gidney *v.* Earl, 12 Wend. 98; Cortelyou *v.* Van Brundt, 2 Johns. 357; 1 Burr. 143; 2 Stra. 1004; 1 Wils. 107; 6 East, 154.

[9] Robbins *v.* Bowman, 1 Pick. 122.

[10] Lewis *v.* Jones, 1 Pa. St. 336.

[11] Chess *v.* Manown, 3 Watts, 219; Chambers *v.* Furry, 1 Yeates, 167.

natural or artificial, and cannot shut them up.[1] The owner must bridge such ditches or water-courses, and keep them in repair, or the public may do so at his expense.[2] He may excavate and use the space under the street, so long as no injury is done to the street.[3] The owner of a spring on land adjoining a highway is entitled to any and all uses of it which do not interfere with the public safety, do not obstruct or hinder public travel, and do not increase the public burden of making repairs. If the water of a spring in a highway may be allowed to flow upon the land of the owner, and the way can at the same cost and with equal safety be maintained, this must be done. The right of the owner to the use of the spring, under these limitations, takes precedence of the right of the officers to divert it to the lands of others, if in so doing their sole motive is to establish a public watering-place. The court may inquire as to the *purpose* for which the selectmen diverted the flowing water from the owner; if not in the line of governmental duty, solely to secure the proper degree of safety to the traveller, they cannot be sustained in their action. The selectmen are not authorized to impose the additional burden on the land of ministering to the public comfort.[4] The right of way existing in the public is a right of passage along the highway, and not a right to get water, either in streams or springs, on the soil of the land-owners. The water is no part of the highway, and its use is not an incident to the use of the highway. Hence it is proper for highway commissioners to allow, under statutory authority, the owners of land to connect their fences with the abutments of bridges, although by so doing the public are deprived of the use of the stream

[1] Perley *v.* Chandler, 6 Mass. 454; Woodruff *v.* Neal, 28 Conn. 165; Woodring *v.* Forks Township, 28 Pa. 355; Bolling *v.* Mayor, 3 Rand. 563; Moran *v.* McClearns, 63 Barb. 185.

[2] Woodring *v.* Forks Township, 28 Pa. 355; Nobles *v.* Langly, 66 N. C. 287.

[3] McCarthy *v.* Syracuse, 46 N. Y. 194.

[4] Suffield *v.* Hathaway, 44 Conn. 521.

as a ford, or of the use of a spring in the owner's land near by.[1]

§ 57. **Cessation of public use —Reversion to owner.** — When the public use has ceased, the property originally condemned or dedicated reverts to the former owner. This right of reversion is valuable, and cannot be taken for public purposes without an additional compensation.[2] A change in the public use, from one kind of public use to another, which is not a material change, will not operate as an abandonment of the prior use so that a reversion to the owner would supervene. A change from a plank-road to a public road,[3] or from a canal into a railroad,[4] would not be of such a nature that there would be a reversion to the owner. A use for private purposes, of lands condemned for public use, is certainly an abandonment of the public use. The owner, in such case, might have a writ of entry. A railroad cannot condemn land, and then adapt the same to the use of tenants, and rent the same. That use is beyond the authority of the charter, and the company would be liable in trespass and for the mesne profits.[5] The owner may also maintain ejectment on a disuse.[6] It is not necessary to show an absolute forfeiture of the franchise, to justify an entry by the owner. It is enough that the property has been so treated as to induce the belief that it has been abandoned. The failure to complete a road, and allowing

[1] Town of Old Town *v.* Dooley, 81 Ill. 255.

[2] Heard *v.* Brooklyn, 60 N. Y. 242.

[3] The People *v.* Lawrence, 54 Barb. 589. On a taking of a plank-road by a railroad, the owner cannot claim that the fee reverts to him on account of the non-user of the plank-road. The uses are similar, and the owner cannot claim a second compensation. Brainard *v.* Missisquoi R. R., 48 Vt. 107.

[4] Malone *v.* Toledo, 28 Ohio St. 643.

[5] Proprietors of Locks *v.* Nashua R. R., 104 Mass. 1. But see Hamilton *v.* Annapolis R. R., 1 Md. 553, where it is held that a forfeiture does not ensue, but that the improper use may be enjoined.

[6] Whitbeck *v.* Cook, 15 Johns. 483.

owners to use portions of the land, is evidence tending to show an abandonment.[1] It is proper to have the matter of abandonment governed by statute, as in Maine, where land condemned for the use of a school-house reverts when a school-house ceases to be on the land for two years.[2] The authority to a railroad company to take lands for its own use does not authorize the taking of a fee, but only of an easement, and hence the railroad company cannot convey a certain portion of its right of way to a city for a highway. Such a conveyance would be an abandonment of the use for which the land was taken, and the owner might maintain ejectment against the city for the land.[3]

§ 58. **Power exhausted by one exercise — Limitations as to time and amount.** — The power of eminent domain, delegated by legislative enactment, is exhausted after one exercise.[4] The corporation should foresee and provide for the increase of its business. To admit the right to successive exercises of the power would be to subject all the land in the state to condemnation at any future time.[5] Hence a corporation may condemn more land than it at present needs, but only what may in good faith be presumed to be necessary when traffic shall be extended.[6] An authority in an act to change a route on account of difficulty of construction is to be strictly construed, and must be exercised before the construction is completed, and not afterward.[7] For a new

[1] Hooker *v.* Utica Turnpike, 12 Wend. 371.

[2] Jordan *v.* Haskell, 68 Me. 189.

[3] Strong *v.* Brooklyn, 68 N. Y. 1.

[4] Mason *v.* Brooklyn City R. R., 35 Barb. 373; Brooklyn Central R. R. *v.* Brooklyn City R. R., 32 Barb. 358; Hudson Canal Co. *v.* New York R. R., 9 Paige, 323; Kenton County Court *v.* Turnpike Co., 10 Bush, 529; Brigham *v.* Agricultural Branch R. R., 1 Allen, 316.

[5] Morris R. R. *v.* Central R. R., 31 N. J. L. 205.

[6] Lodge *v.* Philadelphia R. R., 8 Phila. 345.

[7] Atkinson *v.* Marietta R. R., 15 Ohio St. 21; Little Miami R. R. *v.* Naylor, 2 Ohio St. 235.

exercise the company must seek renewed authority.[1] In Massachusetts, legislation has been provided by which the limits of the subsequent condemnation shall be prescribed by the county commissioners. The corporation cannot locate first, and then have the commissioners prescribe the location as made by it.[2] In New York there is an act authorizing a submission of the question to the court, whether or not the increase of business justified an additional condemnation. The maps of the additional land needed are submitted to the court, with evidence of the necessity of the proposed condemnation.[3] Under that act, prospective improvements not yet entered on could not be admitted to prove the necessity of additional condemnation.[4] Opposed to the doctrine as above stated are several respectable authorities, which argue that railroads are built through new countries, and their development requires additional conveniences and appliances; that it cannot have been the intention of the legislature to oblige the company to acquire all the land it should ever want, at once;[5] that it may be as well presumed that the power to purchase would be exhausted, as well as the power of condemnation.[6] Again, it is said that during the progress of the work unforeseen circumstances may arise, requiring more land than at first located, and that the company must be entitled to a second inquisition; for otherwise it would necessitate the taking of too much, in order to be sure of having enough.[7] Clauses in charters may imply the right to a subsequent condemnation. The power to make necessary side tracks means to

[1] Moorhead *v.* Little Miami R. R., 17 Ohio, 340.

[2] Derby *v.* Framingham R. R., 119 Mass. 516.

[3] Matter of New York Central R. R., 11 N. Y. Sup. Ct. 881.

[4] Rensselaer R. R. *v.* Davis, 43 N. Y. 137.

[5] Mississippi R. R. *v.* Devaney, 42 Miss. 555; Virginia R. R. *v.* Lovejoy, 8 Nev. 100.

[6] Chicago R. R. *v.* Wilson, 17 Ill. 123.

[7] Hamilton *v.* Annapolis R. R., 1 Md. 553; South Carolina R. R., *ex parte*, 2 Rich. L. 484.

make them when they shall become necessary; otherwise it would be the power to make unnecessary side tracks. Such power may be exercised when necessary, and hence is not exhausted by one exercise. There is more danger that the corporation will appropriate too much land at first, than not enough.[1] If the legislature imposes the condition that a railroad shall be completed within a certain time, its power of eminent domain must be exercised before the expiration of that time. After that time, it cannot take lands without the consent of the owner.[2] The condition is not in the nature of a forfeiture, to be taken advantage of by the state alone in a direct proceeding, but the non-compliance renders the proceedings of no effect.[3] Although there is a limitation placed on the amount to be taken, — as, of one hundred feet for a right of way for a railroad, — the railroad will not be held strictly to the amount, if a larger amount is necessary in order to make the track secure.[4] An authority to condemn a roadway to a certain width is not lost by a condemnation of a less width. At any time afterward the condemnation may be made up to the full width authorized. The power cannot be said to be exhausted because it has never been exercised, and the fact that the road has been run on a smaller roadway does not necessarily give rise to the implication that the road was treated as completed.[5] If the discretion is to take a certain amount, or less, and a less amount is taken, it is presumed that the company has exercised its judgment of its necessities, and cannot afterward condemn to the full limit at first permitted.[6] That a corporation has already constructed and is operating its road is no legal reason why it cannot take

[1] Toledo R. R. *v.* Daniels, 16 Ohio St. 390.

[2] Peavey *v.* Calais R. R., 30 Me. 498; New York R. R. *v.* Boston R. R., 36 Conn. 196; Morris R. R. *v.* Central R. R., 31 N. J. L. 205.

[3] New York R. R. *v.* Boston R. R., 36 Conn. 196.

[4] The State *v.* Armell, 8 Kan. 288.

[5] Childs *v.* Central R. R., 33 N. J. L. 323; Sadd *v.* Maldon Rail. Co., 20 L. J. (Exch.) 102; Stamps *v.* Birmingham Rail. Co., 17 L. J. (Ch.) 481.

[6] Prather *v.* Jeffersonville R. R., 52 Ind. 16.

proceedings to acquire a right to use the land upon which its track is laid, if there is any doubt about the title obtained by the first effort at condemnation.[1]

§ 59. **Necessary and convenient buildings — Maintenance — Repairs — Side tracks — Telegraph lines, etc.** — Under the general authority to construct and maintain a public improvement, all the necessary appurtenances are included. Authority to construct a railroad, with its necessary appendages and the buildings convenient and necessary, is sufficient to justify condemnation for engine-houses,[2] depots,[3] repair-shops,[4] tanks,[5] sheds for storing cars not in use,[6] paint-shops,[7] lumber and timber sheds,[8] buildings for

[1] Matter of Prospect Park R. R., 67 N. Y. 371.

[2] Hannibal R. R. *v.* Muder, 49 Mo. 165.

[3] Hamilton *v.* Annapolis R. R., 1 Md. 553; Hannibal R. R. *v.* Muder, 49 Mo. 165; New York R. R. *v.* Kip, 46 N. Y. 546; The State *v.* Mansfield, 28 N. J. L. 510; Nashville R. R. *v.* Cowardin, 11 Humph. 348; Giesy *v.* Cincinnati R. R., 4 Ohio St. 308.

[4] Eldridge *v.* Smith, 34 Vt. 484. In a recent case in California, reported in 6 Reporter, 708, not yet reported in the regular reports, being the case of Southern Pacific Railroad *v.* Raymond, the court discusses the extent to which a railroad company may proceed in condemning land for the "necessary appendages and adjuncts" allowed by the statute. The court says: "Whether or not workshops for the repair and safe-keeping of the cars and locomotives of the plaintiff are necessary appendages and adjuncts to this road, under all the circumstances to be developed at a trial, and, if so, whether the land sought to be condemned is necessary as a site for said buildings, are questions of fact, on which issues may be joined, to be decided at the trial. In some of the states it has been decided that the court will take judicial notice that workshops for the repair of the engines and cars of a railroad corporation are necessary appendages and adjuncts, without which the railroad could not be successfully operated; and for the purposes of this decision we shall assume, without deciding the point, that such is the law. But assuming, as a general proposition, that some workshops for this purpose are necessary appendages to a railroad, it may be that this railroad is already amply supplied with all the necessary appendages of this character. It may have a sufficiency of workshops for this purpose; or, if not, it may already have sufficient land, conveniently located, on which to erect them. These are facts to be ascertained at the trial, on proper issues formed for that purpose."

[5] Chicago R. R. *v.* Wilson, 17 Ill. 123.

[6] New York R. R. *v.* Kip, 46 N. Y. 546; The State *v.* Mansfield, 28 N. J. L. 510.

[7] Low *v.* Galena R. R., 18 Ill. 324.

[8] *Ibid.*

convenient receipt and delivery of freight,[1] space on which to pile lumber and material to be used on or transported over the road,[2] terminal facilities, including tracks to reach stock-yards of company, to reach elevators and river front,[3] and for wood and coal yards.[4] The erection of houses to rent to employees or officers of road,[5] of warehouses as such,[6] of slips to accommodate vessels bringing freight to or taking freight from railroad,[7] are not such uses as to justify the exercise of eminent domain under a general authority to construct a railroad and its appendages. In Eldridge *v.* Smith,[8] Poland, C. J., doubts whether a railroad can condemn land for the site of shops to build cars, any more than to condemn iron for rails, or glass, nails, and paint for the cars, and that only such materials as railroads must have in running the road could be condemned. For any abuse of power, the corporation may be restrained and confined to a legitimate use of its franchise.[9] Authority to maintain a public improvement of suitable width, depth, and dimensions will authorize alterations by widening and deepening.[10] Under general authority to maintain an improvement, land may be appropriated to make a new and desirable connection with a new bridge,[11] or to provide necessary space on which to deposit waste earth ;[12] but not to make an essential variation in route, however necessary or desira-

[1] New York R. R. *v.* Kip, 46 N. Y. 546; Nashville R. R. *v.* Cowardin, 11 Humph. 348.

[2] Cumberland Valley R. R. *v.* McLanahan, 59 Pa. 23; Lance's Appeal, 55 Pa. 16.

[3] New York Central R. R. *v* Metropolitan Gas-Light Co., 68 N. Y. 326.

[4] The State *v.* Mansfield, 23 N. J. L. 510.

[5] Eldridge *v.* Smith, 34 Vt. 484; Rensselaer R. R. *v.* Davis, 43 N. Y. 137; The State *v.* Mansfield, 23 N. J. L. 510; Nashville R. R. *v.* Cowardin, 11 Humph. 348.

[6] Hamilton *v.* Annapolis R. R., 1 Md. 558.

[7] Rensselaer R. R. *v.* Davis, 43 N. Y. 137.

[8] 34 Vt. 484.

[9] Chicago R. R. *v.* Wilson, 17 Ill. 123; Hamilton *v.* Annapolis R. R., 1 Md. 558; Reed *v.* Louisville Bridge, 8 Bush, 69.

[10] Selden *v.* Delaware Canal Co., 29 N. Y. 634.

[11] Mississippi R. R. *v.* Devaney, 42 Miss. 555.

[12] Lodge *v.* Philadelphia R. R., 8 Phila. 345.

ble.[1] The power to construct a railroad includes the power to use land condemned for necessary side tracks[2] and turn-outs.[3] A side track would not include a track on one side of a town, to be used for three years, while the main road was in process of construction on the other side of the town.[4] Double tracks must mean on the same street, and not on adjoining streets.[5] An extension of a road would mean by means of an elongation, and would not authorize a lateral branch.[6] A telegraph line, if not indispensable to a railroad, tends so much to facilitate its business, and to the speedy and safe running of its trains, that the railroad company has a right to build it, to use its right of way therefor, and to remove all obstructions thereon to its fullest and most uninterrupted and beneficial use. Although it may have but an easement in the land, and that easement limited to its use for railroad purposes, yet a telegraph is so convenient, if not indispensable, that it may cut down every tree and bush on the right of way, if necessary for the most constant and efficient use of a telegraph line built by it over and upon such right of way, just as it may dig away a hill or fill up a ravine for the sake of a water-tank or a station-house. By so doing, it gives the adjacent landowner no claim for damages. Such use is contemplated in the original condemnation, and the damages resulting therefrom are part of the damages included in the assessment therefor. Such use is not an additional burden on the right of way; and it does not signify that the line was erected by a telegraph company, for the joint use of such company and railroad.[7]

[1] Moorhead v. Little Miami R. R., 17 Ohio, 340.

[2] Cleveland R. R. v. Speer, 56 Pa. 325; Philadelphia R. R. v. Williams, 54 Pa. 103; Protzman v. Indianapolis R. R., 9 Ind. 467.

[3] Knight v. Carrollton R. R., 9 La. An. 284; New Orleans R. R. v. Second Municipality, 1 La. An. 128.

[4] Currier v. Marietta R. R., 11 Ohio St. 228.

[5] The People v. New York R. R., 45 Barb. 73.

[6] The People v. New York R. R., 45 Barb. 73.

[7] Telegraph Co. v. Rich, 19 Kan. 517.

CHAPTER VII.

OF DELEGATION OF THE POWER OF EMINENT DOMAIN.

§ 60. The power may be delegated — Delegation to engineers — Contractors.
61. Delegation to corporations.
62. Discretion to be exercised — Selection of route.
63. Condemnation by corporation after sale or lease of its property — Rights of vendee.
64. Immunity of officers engaged in condemnation from actions of trespass.

§ 60. **The power may be delegated — Delegation to engineers — Contractors.** — The sovereign, in exercising the power of eminent domain, must employ agents or servants. The legislative body cannot supervise every act done, and hence, by force of circumstances, the power must be delegated. This power may be delegated to individuals[1] and their associates,[2] to corporations,[3] both municipal and private, and to corporations of another state.[4] The employees of public officers are constituted agents for the purpose of condemnation. Public officers are not supposed to condemn land or take materials in person, but may cause them to be taken by their proper agents, and no express authority need be given by statute to such employees. The owner of the land does not look to the employees for his compensation, but to the state or the corporation condemning.[5] Judge Redfield, in

[1] Crittenden *v.* Wilson, 5 Cow. 165; Matter of Kerr, 42 Barb. 119; Beekman *v.* Saratoga R. R., 3 Paige, 45; Tide-Water Co. *v.* Archer, 9 Gill & J. 479.

[2] Young *v.* Buckingham, 5 Ohio, 485.

[3] North Missouri R. R. *v.* Gott, 25 Mo. 540; Boston Water-Power Co. *v.* Boston R. R., 23 Pick. 360; Buffalo R. R. *v.* Brainard, 9 N. Y. 100.

[4] Matter of Townsend, 39 N. Y. 171; Morris Canal Co. *v.* Townsend, 24 Barb. 658; New York R. R. *v.* Young, 33 Pa. 175.

[5] Vermont R. R. *v.* Baxter, 22 Vt. 365; Schmidt *v.* Densmore, 42 Mo. 225.

Vermont Railroad *v.* Baxter,[1] considers that a contractor would be included in "the engineers, agents, or workmen" of the corporation. The engineers and contractors must exercise the power under the authority of the commissioners or corporate authorities, and the contractor may secure the condemnation of the land or materials necessary, and pay the compensation awarded.[2] The discretion must be exercised by the commissioners upon whom the power is conferred.[3] A contractor for public work is not necessarily an agent of the state, and his actions are not protected by the laws controlling the exercise of eminent domain, but he would be liable in trespass for an attempted exercise.[4] A land-agent authorized by law to "cause" roads to be located cannot locate them himself. He must use the ordinary means, and apply to the county commissioners to proceed.[5] A corporation cannot escape liability by contracting with others, notwithstanding the party may be a municipal corporation. The corporation is primarily liable.[6]

§ 61. **Delegation to corporations.** — It is not strange that the sovereign should delegate to municipal corporations the exercise of the power of eminent domain. The control of streets is generally delegated to them, and the discretion exercised by them in opening and widening is not subject to revision by the courts.[7] A city council condemning land acts in a *quasi*-judicial capacity. A city is not

[1] 22 Vt. 865. In Minnesota, a contractor for the construction of a public street has implied authority to remove whatever materials may be necessary to construct the street. St. Anthony Falls Co. *v.* King Bridge Co., 28 Minn. 186.

[2] Bliss *v.* Hosmer, 15 Ohio, 44.

[3] Lyon *v.* Jerome, 26 Wend. 485.

[4] St. Peter *v.* Denison, 58 N. Y. 416; Schmidt *v.* Densmore, 42 Mo. 225. While the government cannot be enjoined, its agents may be. Avery *v.* Fox, 1 Abb. U. S. 246. And their proceedings are controlled by *certiorari* or appeal. McArthur *v.* McEachin, 64 N. C. 454.

[5] Burns *v.* Annas, 60 Me. 288.

[6] Gardiner *v.* Boston R. R., 9 Cush. 1.

[7] Methodist Church *v.* Baltimore, 6 Gill, 391; Alexander *v.* Baltimore, 5 Gill, 383.

bound by its contracts or covenants of quiet enjoyment so as to prevent the condemnation, for public purposes, of land which has been conveyed by the city.[1] This power does not authorize a condemnation of property already appropriated by the state to another public purpose.[2]

This power may also be delegated to private corporations, to be exercised under general laws. It is not necessary that the legislature should act on each particular case, or select the property to be appropriated. The projectors are not supposed to enter upon an improvement which the public do not need.[3] Unless it appears that the location is injudicious or in bad faith, the discretion of the corporation will not be interfered with.[4] The question of delegation and the extent of power delegated is one of propriety with the legislature, and not one of power.[5] The power to condemn may be delegated to a corporation of another state, for the benefit of a canal in another state. That is a matter of legislative discretion.[6] The power delegated to a private corporation to exercise the eminent domain does not extend to it the immunity, which the state enjoys, from damages which necessarily result to individuals by the construction of public works in a skilful manner.[7] The corporation proposing to condemn must show a regular organization,

[1] Brimmer *v.* Boston, 102 Mass. 19.

[2] Mayor *v.* Central R. R., 53 Ga. 120.

[3] Weir *v.* St. Paul R. R., 18 Minn. 155; Buffalo R. R. *v.* Brainard, 9 N. Y. 100.

[4] Bonaparte *v.* Camden R. R., Baldw. 205.

[5] Boston Water-Power Co. *v.* Boston R. R., 23 Pick. 360; Buffalo R. R. *v.* Brainard, 9 N. Y. 100; Clarke *v.* Rochester, 24 Barb. 446; Scudder *v.* Trenton Falls Co., 1 N. J. Eq. 694; Whiteman's Executors *v.* Wilmington R. R., 2 Harr. 514; Bellona Co.'s Case, 3 Bland, 442; Brown *v.* Beatty, 34 Miss. 227; Buffalo R. R. *v.* Ferris, 26 Texas, 588.

[6] Matter of Townsend, 39 N. Y. 71; Morris Canal Co. *v.* Townsend, 24 Barb. 658. Under the general act relating to railroads, in Iowa, a foreign corporation has no power to condemn lands; nor can the owner of lands institute proceedings, under the statute, for the assessment of damages against a foreign corporation occupying his land. Holbert *v.* St. Louis R. R., 45 Iowa, 23.

[7] Tinsman *v.* Belvidere R. R., 26 N. J. L. 148. *Contra*, Monongahela Nav. Co. *v.* Coons, 6 Pa. 379.

and a proper certificate of organization, before it can condemn.[1] A corporation *de facto* may condemn.[2] In proceedings to condemn land, the owner cannot obtain an injunction because the company is not legally organized, or is working in the interest of another company. The constitutional protection that possession cannot be taken until compensation is paid is sufficient. The corporate existence is to be presumed from the face of a valid charter.[3]

§ 62. **Discretion to be exercised — Selection of route.** — A large discretion is conferred on corporations in the selection of property suitable for their purposes. It is presumed that self-interest will dictate that they will not abuse their powers, and make an improvement where there is no demand for it, and where the investment would be unprofitable. The exercise of this discretion will not be revised by the court, unless it appears that they have clearly exceeded the limitations of the charter and have acted in bad faith.[4] The remedy is in a direct action, and not by exceptions to the preliminary proceedings, which are presumed to be founded on a proper exercise of discretion.[5] A jury of view cannot control the discretion on the ground that another location would do less damage;[6] or that a fee should be taken, when the officers of the company considered an easement sufficient.[7] The selection of certain land for the purpose is *primâ facie* good and binding.[8] Authority to

[1] Atlantic R. R. *v.* Sullivant, 5 Ohio St. 276.

[2] McAuley *v.* Chicago R. R., 83 Ill. 348 (1877).

[3] Aurora R. R. *v.* Miller, 56 Ind. 88.

[4] Fall River Iron-Works *v.* Old Colony R. R., 5 Allen, 221; Hentz *v.* Long Island R. R., 13 Barb. 646; South Carolina R. R. *v.* Blake, 9 Rich. L. 228; Collins *v.* Creecy, 8 Jones L. 383.

[5] Manhattan Co., *ex parte*, 22 Wend. 653; Parke's Appeal, 64 Pa. 137; Supervisors *v.* Gorrell, 20 Gratt. 484; Cotton *v.* Boom Co., 22 Minn. 372.

[6] New York R. R. *v.* Young, 33 Pa. 175.

[7] Charleston R. R. *v.* Blake, 12 Rich. L. 634.

[8] Virginia R. R. *v.* Elliott, 5 Nev. 358; Cotton *v.* Boom Co., 22 Minn. 372. Although a company may own land adjoining that which it seeks to condemn,

construct a road by the most feasible route gives a wide discretion. If a mountain is in the course, the route may go around it or tunnel through it. A direct line between points is not required. Rivers are to be crossed at the most feasible points, and natural obstacles are to be avoided.[1] A road to commence at a certain town may commence one and a half miles from it.[2] The private owner over whose land the road runs is not the proper party to insist that the court should settle the exact degree of propinquity necessary to satisfy the legislative direction that one terminus should be at or near a certain place.[3] A charter authorizing a road to run "from a point at or near the present terminus" is satisfied by a location 2,475 feet from said terminus.[4] A charter authorizing the road to be constructed "to the place of shipping lumber" on a tide-water river would not limit the location to the upland or to the shore, but the road might be extended across the flats and over tide-waters, to a point where the lumber may be conveniently shipped.[5] In order to obviate complaints of abuse of discretion, the Legislature of New York passed an act requiring the filing of a map of the proposed road, and that parties aggrieved may apply for the appointment of commissioners to have the road altered.[6] These petitioners must be land-owners who would suffer some extraordinary or peculiar injury not common to others, and who could be relieved without damage to the public or to others. The remedy cannot be applied to force the road from the

that does not prevent the condemnation of the full 100 feet by the side of that already owned. The company is the best judge of the amount of land needed for its purposes. Stark *v.* Sioux City R. R., 43 Iowa, 501.

[1] South Minnesota R. R. *v.* Stoddard, 6 Minn. 150; Hentz *v.* Long Island R. R., 13 Barb. 646.

[2] Parke's Appeal, 64 Pa. 137.

[3] Walker *v.* Mad River Co., 8 Ohio, 38.

[4] Fall River Iron-Works *v.* Old Colony R. R., 5 Allen, 221.

[5] Peavey *v.* Calais R. R., 30 Me. 498.

[6] Norton *v.* Wallkill R. R., 61 Barb. 476.

land of one owner upon another, nor can the continuity of the route be broken.[1]

§ 63. **Condemnation by corporation after sale or lease of its property — Rights of vendee.** — Notwithstanding a railroad may be leased to another corporation, the right still remains with the lessor to condemn land for the use of the road.[2] The vendee of a road built by the state succeeds to the power of eminent domain, and to the immunity enjoyed by the state from claims for consequential damages.[3] A consolidated railroad company may condemn, if the legislature has recognized the consolidation as valid.[4] The right to carry on proceedings already commenced cannot be transferred so as to authorize the purchasing company to carry on proceedings in the name of the selling company. This right cannot be purchased or sold,[5] and does not pass under foreclosure of mortgage.[6]

§ 64. **Immunity of officers engaged in condemnation from actions of trespass.** — The exercise of the power of eminent domain is the exercise of a sovereign right, and the officers engaged in it are servants of the state.[7] So long as they act in good faith within the scope of the powers granted to them, without being guilty of negligence, carelessness, or wanton disregard of the rights of individuals,

[1] The People v. Tubbs, 59 Barb. 401.

[2] Kip v. New York R. R., 18 N. Y. Sup. Ct. 24. On appeal to the Court of Appeals (67 N. Y. 227), the court held that the lessee of a railroad company may continue proceedings already commenced to condemn land in the name of the lessor. The leasing the road does not affect the proceedings of condemnation.

[3] Freeland v. Pennsylvania R. R., 66 Pa. 91.

[4] McAuley v. Chicago R. R., 83 Ill. 348 (1877).

[5] Mahony v. Spring Valley Water-Works, Sup. Ct. Cal. (1877), not yet reported.

[6] Atkinson v. Marietta R. R., 15 Ohio St. 21.

[7] Brimmer v. Boston, 102 Mass. 19.

they will be protected from all liability, except in the mode and by the process fixed by the statute under which they act.[1] Officers may be liable for unskilful and improper execution of improvements under their charge, while otherwise they would be free from actions.[2] The general doctrine is that, where the legislature authorizes an act, the natural consequence of which is a damage to the property of another, and a mode is provided in which damages should be ascertained, he who does the act will not be liable as a wrong-doer.[3] For a failure to strictly comply with the statute the officer will be liable,[4]—as, if he enters upon land without having the damages assessed.[5] Errors of the court in declaring the law, or irregularities in the preliminary proceedings, cannot be introduced in an action against officers, if the court possessed jurisdiction over the subject-matter. For such errors there is a remedy by appeal or *certiorari*.[6] Trespass will lie against an officer acting under a void order,[7] or a law plainly unconstitutional.[8] An action will not lie against public officers on the ground that they acted wantonly, maliciously, and with intent to injure the complainants, or that their acts were unnecessary for the purpose of carrying out the public improvement.[9]

[1] Mellen *v.* Western R. R., 4 Gray, 301.

[2] Rowe *v.* Addison, 34 N. H. 306.

[3] Woods *v.* Nashua Co., 4 N. H. 527; Aldrich *v.* Cheshire R. R., 21 N. H. 359; Little Miami R. R. *v.* Whitacre, 8 Ohio St. 590; American Print-Works *v.* Lawrence, 23 N. J. L. 590; Rogers *v.* Bradshaw, 20 Johns. 735; Stevens *v.* Middlesex Canal, 12 Mass. 466; Keene *v.* Chapman, 25 Me. 126; Lebanon *v.* Olcott, 1 N. H. 339.

[4] Kelley *v.* Horton, 2 Cow. 424.

[5] McCord *v.* High, 24 Iowa, 336; Beckwith *v.* Beckwith, 22 Ohio St. 180. He might also be enjoined. Carpenter *v.* Grisham, 59 Mo. 247.

[6] Baker *v.* Runnels, 12 Me. 235; Butler *v.* Barr, 18 Mo. 357. An entry made under authority of the court below is not a trespass, although under proceedings held to be erroneous on appeal. Dussuau *v.* Municipality, 6 La. An. 575.

[7] Leach *v.* Day, 27 Cal. 643.

[8] Lee *v.* Pembroke Iron Co., 57 Me. 481; Comins *v.* Bradbury, 10 Me. 447; Ash *v.* Cummings, 50 N. H. 591. *Contra*, American Print-Works *v.* Lawrence, 23 N. J. L. 590, where the remedy is said to be by injunction and contesting the constitutionality of the act.

[9] Benjamin *v.* Wheeler, 8 Gray, 409; Sage *v.* Laurain, 19 Mich. 137.

CHAPTER VIII.

OF THE INTERESTS AND OWNERSHIPS WHICH MAY BE AFFECTED BY CONDEMNATION.

§ 65. What persons are considered "owners."
66. Vendor and vendee — Change of title.
67. Change of title by death — Claims of heirs and administrators.
68. Landlord and tenant.
69. Landlord and tenant — Apportionment of rent.
70. Landlord and tenant — Rebuilding when parts of leased buildings are taken.
71. Dower interest — Separate property of wife — Homestead.
72. Infants.
73. Joint-interests — Tenants for life — Remainder-men — Residuary legatees.
74. Rights of holders of encumbrances and liens — Judgment-liens.
75. Legal and equitable titles — Trustees and *cestuis que trust* — Receivers — Guardians.
76. Unknown owners — Conflicting claims — Payment into court.
77. Duty of condemning party to ascertain ownership of property taken.

§ 65. **What persons are considered "owners."** — In the land or property taken there may be various interests, in different individuals. The entire value of the land is all that can be awarded to the several owners, and no contracts between the owners can oblige the public to pay more than the entire value of the land as a whole.[1] In settling the damages between the owners, the situation and manner of the occupation should be considered.[2] Among the various titles and interests recognized as entitled to compensation as owners, are lessees and landlords,[3] mortgagees and mort-

[1] Burt *v.* Wigglesworth, 117 Mass. 302; Burt *v.* Merchants' Ins. Co., 115 Mass. 1; Edmands *v.* Boston, 108 Mass. 535; Ross *v.* Elizabethtown R. R., 20 N. J. L. 230

[2] Burt *v.* Merchants' Ins. Co., 115 Mass. 1.

[3] Parks *v.* Boston, 15 Pick. 198; Biddle *v.* Hussman, 23 Mo. 597; Lawrence *v.* Boston, 119 Mass. 126; North Pennsylvania R. R. *v.* Davis, 26 Pa. 238; Frost *v.* Earnest, 4 Whart. 86.

gagees,[1] mortgagees of leaseholds,[2] trustees and *cestuis que trust*,[3] residuary legatees under wills,[4] executors of active trusts,[5] widows,[6] heirs,[7] married women with separate estates,[8] tenants for life,[9] owners of private ways,[10] and of rights in public common,[11] and holders of bonds for deeds.[12] Damages are to be assessed to every owner, although no claim may have been made.[13]

§ 66. **Vendor and vendee — Change of title.** — The claim for damages and of title to land may be distinct. Damages for taking and injury to land belong to the owner at the time of the injury, and do not pass to a subsequent vendee.[14] The owner alone can take advantage of a claim

[1] Cool *v.* Crommet, 13 Me. 250; Platt *v.* Bright, 29 N. J. Eq. 128.

[2] Hagar *v.* Brainard, 44 Vt. 294; Astor *v.* Hoyt, 5 Wend. 603.

[3] Reed *v.* Hanover Branch R. R., 105 Mass. 303. Equitable interests are included. Martin *v.* London, Chatham & Dover Rail. Co., 35 L. J. (Ch.) 795; L. R. 1 Eq. 145.

[4] Shelton *v.* Derby, 27 Conn. 414.

[5] The People *v.* Robinson, 29 Barb. 77.

[6] Columbia Bridge Co. *v.* Geisse, 35 N. J. L. 558; New Orleans R. R. *v.* Frederic, 46 Miss. 1.

[7] Booneville *v.* Ormrod's Admr., 26 Mo. 193.

[8] The State *v.* Hulick, 33 N. J. L. 307; Tennessee R. R. *v.* Love, 8 Head, 63.

[9] Harrisburg *v.* Crangle, 3 Watts & S. 460; Passmore *v.* Philadelphia R. R., Phila. (C. P.) 1872; Colcough *v.* Nashville R. R., 2 Head, 171; Burbridge *v.* New Albany R. R., 9 Ind. 546.

[10] Philadelphia R. R. *v.* Williams, 54 Pa. 103.

[11] Boll *v.* Ohio R. R., 1 Grant. 105.

[12] St. Louis R. R. *v.* Wilder, 17 Kan. 239. Such holder being entitled to damages as owner in fee. The English rule does not recognize as an owner one who simply has a contract of purchase, but such owner may intervene after the compensation has been paid, and assert his rights to the fund. Tasker *v.* Small, 7 L. J. (Ch.) 19; Bird *v.* Great Eastern Rail. Co., 34 L. J. (C. P.) 866; Willey *v.* South-Eastern Rail Co., 18 L. J. (Ch.) 201.

[13] The State *v.* Runyon, 24 N. J. L. 256; The State *v.* Garretson, 23 N. J. L. 888.

[14] Sargent *v.* Machias, 65 Me. 591; Allyn *v.* Providence R. R., 4 R. I. 457; Ten Brooke *v.* Jahke, 77 Pa. 392; Turnpike Road *v.* Brosi, 22 Pa. 29; Dobbins *v.* Brown, 12 Pa. St. 75; Zimmerman *v.* Union Canal Co., 1 Watts & S. 346; Schuylkill Co. *v.* Decker, 2 Watts, 343; McLendon *v.* Atlanta R. R., 54 Ga. 293; Pomeroy *v.* Chicago R. R., 25 Wis. 641. *Contra*, Caldwell *v.* Bank, 20 Ind. 294.

for damages, and if he does not claim, his subsequent vendee cannot.[1] If proceedings are only inchoate, a quit-claim deed would carry the damages to the vendee.[2] A conveyance not recorded authorizes an assessment in the name of the apparent owner, and if the real owner knows of the assessment, and does not disclose his ownership, he cannot have the proceedings quashed.[3] When one becomes the owner of property pending the proceedings, he may intervene, and object to irregularities in the proceedings.[4] The owner of the legal title is the party to be treated with, notwithstanding he may have made an executory contract of sale.[5] Pendency of proceedings against the vendor does not operate as notice to the vendee.[6] Damages for improper construction go to the owner at the time the damage is suffered, who may be the vendee.[7]

§ 67. **Change of title by death — Claims of heirs and administrators.** — Proceedings to condemn land belonging to the estate of a decedent should be brought against the heirs, and notice should be served on them. The administrator is not the owner of the land.[8] If the land is taken before the death of the former owner, the administrator is entitled to the damages, and must take the proper steps to obtain them.[9] Notice given to the owner is good, notwithstanding death occurs before the assessment, and the heirs are non-residents.[10] By the death of the ancestor the fee

[1] Haskell *v.* New Bedford, 108 Mass. 208; Hentz *v.* Long Island R. R., Barb. 646; McFadden *v.* Johnson, 72 Pa. 335.

[2] Carli *v.* Stillwater R. R., 16 Minn. 260.

[3] Brown *v.* Essex, 12 Metc. 208.

[4] Roberts *v.* Williams, 15 Ark. 48.

[5] Smith *v.* Ferris, 13 N. Y. Sup. Ct. 553.

[6] Curran *v.* Shattuck, 24 Cal. 427.

[7] Southside R. R. *v.* Daniel, 20 Gratt. 344.

[8] Booneville *v.* Ormrod's Admr., 26 Mo. 193.

[9] Neal *v.* Knox R. R., 61 Me. 298; Welles *v.* Cowles, 4 Conn. 182, Hotchkiss *v.* Auburn R. R., 36 Barb. 600; Howcott's Executor *v.* Warren, 7 Ired. 29; *In re* Wootton's Trusts, 7 L. T. (N. S.) 630.

[10] Taylor *v.* Hampden, 18 Pick. 309.

descends to the heirs, and there should be a revivor against them.[1] The administrator cannot bind the heirs by giving consent to proceedings.[2] Where the death occurs between the actual taking and the filing of the petition for damages, the damages are recoverable by the administrator, and not the heirs. The ascertainment of damages may be after the death of the owner, and the damages still go to the administrator. The condemnation is in the nature of a purchase, where the consideration is still due after the death of the former owner, and for this the administrator sues.[3] When the land is taken after the death of the owner, and before the administrator has obtained license to sell for the payment of debts, the right of the heir to the proceeds is clear.[4] He is seized of the estate taken at the time of the taking, subject only to be defeated by a sale not yet made, or authorized, or licensed; and, being the owner, is entitled to the damages.[4] If the estate is shown to be clearly insolvent, the award is to be made to the administrator. This will protect the creditors, and the heirs will be protected by the bond of the administrator, who will pay the debts, and the balance, if any, to the heirs.[5] A residuary legatee in an insolvent estate is entitled to notice, but not to a direct award, because the court cannot measure the interest in such a proceeding.[6] An executor with power to sell is not entitled to take part in the proceedings. The law considers the real estate and the damages to belong to the testator,[7] but if the executor is an executor of an active trust, with power to sell and apply the rents, issues, and profits of the real estate to a certain purpose, he is the proper person to control the proceedings after the death of

[1] Peoria R. R. *v.* Rice, 76 Ill. 329; Satterfield, Admrx., *v.* Crow, 8 B. Mon. 553.
[2] Rush *v.* McDermott, 50 Cal. 471.
[3] Moore *v.* Boston, 8 Cush. 274.
[4] Boynton *v.* Peterborough R. R., 4 Cush. 467.
[5] Goodwin *v.* Milton, 25 N. H. 458; St. Albans *v.* Seymour, 41 Vt. 579.
[6] Shelton *v.* Derby, 27 Conn. 414.
[7] Cashman *v.* Wood, 13 N. Y. Sup. Ct. 520.

the testator.[1] Heirs are not considered as "unknown owners," under statutes requiring advertisement by "unknown owners" claiming proceeds of assessments of damages.[2]

§ 68. **Landlord and tenant.** — The interest of the lessee is such as to entitle him to consideration as an owner,[3] and a mortgage of the leasehold would entitle the mortgagee to notice as an owner.[4] If the statute regulating the condemnation does not provide a remedy for the lessee, he may have his remedy at common law.[5] The value of the land is to be divided between the landlord and lessee. If the rent is equal to the full annual value of the land, the landlord would take all. If the rent is less, the lessee is entitled to the difference, — or, in other words, the market value of his leasehold.[6] The duration of the term is important, and the right of renewal is to be considered, as well as any favorable stipulation in the lease concerning taxes, etc.[7] These go

[1] The People *v.* Robinson, 29 Barb. 77; The State *v.* Orange, 32 N. J. L. 49.

[2] Matter of Art St., 20 Wend. 685.

[3] Muller *v.* Earle, 3 Jones & S. 461; Dyer *v.* Wightman, 66 Pa. 425; Brown *v.* Powell, 25 Pa. 229; Turnpike Road *v.* Brosi, 22 Pa. 29; Frost *v.* Earnest, 4 Whart. 86; Baltimore R. R. *v.* Thompson, 10 Md. 76; Burbridge *v.* New Albany R. R., 9 Ind. 546. Under the English act, the lessee is dealt with separately from the landlord. Brandon *v.* Brandon, 34 L. J. (Ch.) 333. But the tenant's interest could not be purchased when there is a clause in his lease against alienation or sub-letting. Legg *v.* Belfast Rail. Co., 1 I. R. C. L. 124, *n.*

[4] Hagar *v.* Brainard, 44 Vt. 294.

[5] Foote *v.* Cincinnati, 11 Ohio, 408.

[6] Edmands *v.* Boston, 108 Mass. 535; William and Anthony Sts., 19 Wend. 678.

[7] William and Anthony Sts., 19 Wend. 678; Gillespie *v.* Thomas, 15 Wend. 464; North Pennsylvania R. R. *v.* Davis, 26 Pa. 238. A covenant between a brewer, owner in fee of a public-house, and his tenant, that the tenant would buy all his beer from the brewer, is to be considered in assessing the value of the premises. Bourne *v.* Mayor of Liverpool, 33 L. J. (Q. B.) 15. The good-will and right of expecting continuous renewal on account of long-continued occupation may be considered (Farlow, *ex parte*, 2 Barn. & Adol. 341; Still, *ex parte*, 4 Barn. & Adol. 592), but not for fixtures. Gosling, *ex parte*, 4 Barn. & Adol. 596; *Re* Luntley, 14 W. R. 93. A lessee from year to year under a parol lease is an owner, and has a right to have his damages assessed. Gilligan *v.* Providence, 11 R. I. 258; Pettis *v.* Providence, 11 R. I. 372.

to make up the market value of the leasehold. If the landlord has obtained the damages, the tenant may recover from him for the value of his term, and the value of his right to remove buildings at the end of the term;[1] but the lessee is not compelled to look to his landlord, but may hold the condemning party. The landlord is not entitled to the benefits accruing to the tenant's estate by a public improvement; otherwise, the tenant would pay for the improvement by the benefits charged against it, and then pay an enhanced rent also. This was where only a portion of the demised premises were taken for the public improvement.[2] In assessment of damages the landlord and tenant should be considered as one owner, under statutes allowing a separate trial to each owner.[3] A lessee is entitled to damages from the time the final order is made appropriating the land, notwithstanding the actual possession is not taken until after the lease expires. The damages are to be estimated according to the full right acquired by the public, and not merely according to the mode and time of the actual exercise of the right.[4]

§ 69. **Landlord and tenant — Apportionment of rent.** — The condemnation of a part of the leased premises relieves the lessee from a ratable proportion of the rent. Both the landlord and the tenant are owners, and within the protection of the law. The landlord, in case of a condemnation of the whole property, is entitled to the present value of the reversion and the present value of the rents to become due during the term, and the tenant to the present value of his leasehold, over and above the present value of the rent

[1] Coutant *v.* Catlin, 2 Sandf. Ch. 485.

[2] Gillespie *v.* Thomas, 15 Wend. 464; Turnpike Road *v.* Brosi, 22 Pa. 29.

[3] Kohl *v.* United States, 91 U. S. 367.

[4] Edmands *v.* Boston, 108 Mass. 535. The English rule is, that if the tenant remains and enjoys the use of the premises until his term expires, he cannot claim compensation, although notified to quit, by the company, before the expiration of the term. Regina *v.* Southampton Rail Co., 10 Ad. & E. 3; Nadin, *ex parte*, 17 L. J. (Ch.) 421.

payable during the term. The present value of the land should be divided between the landlord and tenant, according to their proportional interests.[1] As the landlord is entitled to his proportion of the assessed value, he is also entitled to a proportion when only a part is taken; and the tenant, being deprived of a portion of the premises, should have his rent apportioned,[2] and may bring an action in equity to have the proportion due from the residue of the lot ascertained and settled once for all, this being a proper proceeding to avoid a multiplicity of suits.[3] The landlord is not entitled, in an apportionment, to the benefit of any annual value of the residue over and above the ratable proportion, arising from the fact that the premises were

[1] Matter of William and Anthony Sts., 19 Wend. 678; Turner v. Williams, 10 Wend. 140; Post v. Logan, 1 N. Y. Leg. Obs. 59; Coutant v. Catlin, 2 Sandf. Ch. 485.

[2] Biddle v. Hussman, 23 Mo. 597; Gillespie v. Thomas, 15 Wend. 464. This is the rule prescribed by the English Lands Clauses Consolidation Act. 8 Vict., c. 18, § 119; Ware v. Regent's Canal Co., 7 Eng. Rail. Cas. 780; 23 L. J. (Exch.) 145. The section of the act is as follows: "119. If any lands shall be comprised in a lease for a term of years unexpired, part only of which lands shall be required for the purposes of the special act, the rent payable in respect of the lands comprised in such lease shall be apportioned between the lands so required and the residue of such lands; and such apportionment may be settled by agreement between the lessor and lessee of such lands, on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by two justices; and after such apportionment the lessee of such lands shall, as to all future accruing rent, be liable only to so much of the rent as shall be apportioned in respect of the lands not required for the purposes of the special act; and as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the recovery of such portion of rent as previously to such apportionment he had for the recovery of the whole rent reserved by such lease; and all the covenants, conditions, and agreements of such lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the land which shall not be required for the purposes of the special act, in the same manner as they would have done in case such part only of the land had been included in the lease."

[3] Kingsland v. Clark, 24 Mo. 24. The landlord has no lien on the amount paid into court for the tenant's interest, notwithstanding the tenant may be in arrears for rent, and the payment should be made to the tenant. Carey, *ex parte*, 10 L. T. 37.

originally rented below what they were worth, or to the increased value caused by the widening of the street. These are profits fairly acquired by the tenant, by virtue of his favorable lease, and the circumstance of condemnation should not give them to the landlord.[1]

In Parks *v.* Boston,[2] Judge Shaw suggests a course that does not seem satisfactory either to landlord or tenant. He considers that the lease is not extinguished in part, or the rent apportioned, by a taking of a part of the premises; that the lessee should pay full rent, but claim in his damages a sufficient sum to meet the rent on the portion taken. This would not satisfy the landlord, for it leaves him solely to the personal obligation of his lessee to pay rent on the portion taken. Otherwise, the landlord could forfeit the lease for non-payment of rent, and obtain possession of the premises. If the lessee collects and appropriates to his own use the fund with which he is to pay the rent for the portion taken, and be insolvent, the landlord is without remedy. He can neither obtain his money or his land. The public is in possession, and has paid, according to the finding of the court, full value for the land, but has placed a portion of the landlord's compensation in the custody of the tenant, when the landlord is entitled to hold it himself.

§ 70. **Landlord and tenant — Rebuilding when parts of leased buildings are taken.** — The taking of a portion of leased premises by the public does not operate to release the lessee from his covenant to make repairs. When a portion of buildings are taken, either lessee or lessor may rebuild, and claim damages, but compensation is not to be paid twice.[3] A lessee of a lower floor may be compelled

[1] Gillespie *v.* Thomas, 15 Wend. 464; Post *v.* Logan, 1 N. Y. Leg. Obs. 59.

[2] 15 Pick. 198. Followed in Patterson *v.* Boston, 20 Pick. 159; *s. c.*, 23 Pick. 425; Foote *v.* Cincinnati, 11 Ohio, 408; Dyer *v.* Wightman, 66 Pa. 425; Workman *v.* Mifflin, 80 Pa. 362 (qualifying Cuthbert *v.* Kuhn, 3 Whart. 357, and Voegtly *v.* Pittsburgh R. R., 2 Grant Cas. 243). This seems also to be the English rule. Wainwright *v.* Ramsden, 5 Mee. & W. 602.

[3] Patterson *v.* Boston, 20 Pick. 159.

to carry a wall up to the roof in order to protect his own premises on the ground-floor, and in such case his claim for damages should diminish that of the lessor and other lessees *pro tanto*. If the other lessees fail to rebuild their parts, they can only claim to recover back such proportion of the estimated expense of the wall as their interests bear to the whole value of the estate.[1] The lessee cannot maintain an action against the landlord to recover from him a certain portion of the sum assessed to him, on the ground that it was intended for the purpose of putting the property in a tenantable condition. The only remedy is by correcting the award. The lessee should see to it that that item of damages is allowed to him.[2] In a lease which forbids alteration without the consent of the landlord, it is probable that the lessee could rebuild the portion of the wall taken down, without the consent of the landlord. At any rate, the city could not be charged with damages resulting from delay of the lessor to give his consent to the alterations rendered necessary by the condemnation.[3]

§ 71. **Dower interest — Separate property of wife — Homestead.** — An inchoate right of dower may be taken during the lifetime of the husband, on giving full compensation to the husband. The inchoate right of dower is not such an interest as is capable of assessment. During the life of the husband he represented the fee, and compensation to him appropriated the fee.[4] When lands are taken after the death, the widow's right to compensation for her dower interest is plain.[5] Commissioners, in assessing damages, need not assess the value of a dower interest when dower has not yet been set out. They should assess to the

[1] Patterson *v.* Boston, 23 Pick. 425.

[2] Turner *v.* Williams, 10 Wend. 140.

[3] Brooks *v.* Boston, 19 Pick. 174.

[4] Moore *v.* Mayor of New York, 8 N. Y. 110; *s. c.*, 4 Sandf. 456; Gwynne *v.* Cincinnati, 3 Ohio, 24. This right is recognized in New Jersey. The State *v.* Easton R. R., 36 N. J. L. 181.

[5] William and Anthony Sts., 19 Wend. 679.

heirs of the estate, and allow the heirs and dowress to settle that matter between themselves.[1]

The estate of a *feme covert* may be taken. The compensation should be paid to her, although her husband should join with her in the proceedings. On a joint petition, the court may pass her title by decree, or may order a joint deed to be made on payment of the money, which money the court must see paid to the wife.[2]

A right of way may be granted over a homestead, without the concurrence of the wife. The right of way is an easement, and not a title. If the homestead should be entirely occupied by the improvement, so that the property could not be used as a homestead, the case would be different.[3]

§ 72. **Infants.** — Lands of persons under the disabilities of infancy, coverture, etc., may be taken, — the court being in duty bound to see to the proper application of the fund.[4] Damages to the property of minors are properly awarded to their guardians. Evidence of guardianship must be shown.[5] Service of notices on the infants themselves will not bind them. Notices should be given to their guardians;[6] and for those who have none, guardians *ad litem* must be appointed, upon whom legal service may be made.[7] The condemning party, desiring to obtain title by the proceedings, must see that the infants are properly represented, or the proceedings will be nugatory.[8]

§ 73. **Joint-interests — Tenants for life — Remaindermen — Residuary legatees.** — Although there may be vari-

[1] Todemier *v.* Aspinwall, 43 Ill. 401.
[2] East Tennessee R. R. *v.* Love, 8 Head, 63.
[3] Chicago R. R. *v.* Swinney, 38 Iowa, 182.
[4] East Tennessee R. R. *v.* Love, 8 Head, 63. The English rule is by the appointment of two surveyors. 8 Vict., c. 18, § 9.
[5] Peavey *v.* Wolfborough, 37 N. H. 286.
[6] Neeld's Road, 1 Pa. 353.
[7] Clarke *v.* Gilmanton, 12 N. H. 515; Jones *v.* Barclay, 2 J. J Marsh. 78.
[8] Hotchkiss *v.* Auburn R. R., 36 Barb. 600.

ous interests and claims to the property taken, the amount to be paid to all should be the value of the property. There may be a gross sum awarded to joint-tenants, and the condemning party is not compelled to see to its apportionment.[1] Tenants in common may proceed alone or jointly, but one cannot recover all in his own name,[2] or release the damages of the other, but the release binds the one releasing. The adjustments of all interests need not be simultaneous.[3] Remainder-men certainly have an interest in land, the value of which may be estimated under the regular statutory proceedings. They have no interest until the termination of the life-estate, which will justify an action of ejectment during its pendency, notwithstanding the damages have not been paid. It is not certain that compensation must be paid to remainder-men during the pendency of the life-estate. It would be a hardship to eject a corporation which has entered by the consent of the life-tenant, and made valuable improvements, when the owner's interest has ceased and the remainder-man succeeds.[4] Life-tenants and remainder-men may join in proceedings for assessment of damages, although they cannot be compelled to join. The fact that the company would be put to great expense by separate actions is no good reason for the corporation to complain, for it must take its chances.[5] In case of disputes between life-tenants and remainder-men the amount may be paid into court, and the condemning party is not bound

[1] The State v. Fischer, 26 N. J. L. 129; Pittsburgh R. R. v. Hall, 25 Pa. 336.

[2] Railroad v. Bucher, 7 Watts, 38; Railroad v. Boyer, 13 Pa. 497.

[3] Ross v. Elizabethtown R. R., 2 N. J. Eq. 422; Austin v. Rutland R. R., 45 Vt. 215. The testimony concerning the interest of one of tenants in common is for the benefit of all others interested in the property. Chicago R. R. v. Chamberlain, 84 Ill. 333. In a recent case in Iowa, it is held that if one of tenants in common accepts the damages awarded to him, the other may still appeal. The damages should be assessed separately to each tenant in common, when their interests can be conveniently ascertained, but if the company fails to do so, and afterward settles with a part of the owners, those not settled with may, upon appeal, have a re-assessment of the damages to which they are entitled. Ruppert v. C. O. & St. Joe R. R., 43 Iowa, 490.

[4] Austin v. Rutland R. R., 45 Vt. 215.

[5] Railroad v. Boyer, 13 Pa. 497; Colcough v. Nashville R. R., 2 Head, 171.

to see to the proper application of the money.[1] Residuary legatees have an interest, although the estate may be insolvent, and they are entitled to notice of proceedings.[2]

§ 74. Rights of holders of encumbrances and liens — Judgment-liens. — The sovereign may properly condemn and close out all encumbrances on land which is deemed necessary for public purposes. The fact that a previous offer had been made of a certain sum does not prevent condemnation.[3] In case an imperfect title is obtained by the first condemnation, new proceedings may be at once commenced to close out the new liens or claims.[4] In proceedings to condemn, the condemning party cannot be bound to take notice of all latent equities. Notice to either the mortgageor or mortgagee is sufficient, especially if the mortgagee is in possession.[5] A statute requiring notice to occupants or owners would require notice to a mortgagee,[6] especially if his mortgage was on record.[7] The question as to which party shall recover the damages is in dispute. The doctrine in New York, which is supported by the best logic, is that the damages should be paid to the mortgagee, because his security is depreciated, and that the damages, when paid, go in solution of the debt. The mortgage is treated as an assignment of the damages,[8] and the damages

[1] Crangle *v.* Harrisburg, 1 Pa. 132. The court may order questions arising between life-tenants and remainder-men, as to the distribution of the fund, to be referred to actuaries. *Re* Philips's Trust, L. R. 6 Eq. 250; *Re* Pfleger, L. R. 6 Eq. 426.

[2] Shelton *v.* Derby, 27 Conn. 414.

[3] United States *v.* Block 121, 3 Biss. 208.

[4] *In re* New York Central R. R., 20 Barb. 419.

[5] Cool *v.* Crommet, 13 Me. 260. A later case, Wilson *v.* European Railroad, 67 Me. 358, requires notice to the holder of a recorded mortgage, although not in possession.

[6] Hagar *v.* Brainard, 44 Vt. 294.

[7] Severin *v.* Cole, 38 Iowa, 463.

[8] Bank of Auburn *v.* Roberts, 44 N. Y. 192; Astor *v.* Hoyt, 5 Wend. 603. In New Jersey, after the land damages have been ascertained, the mortgagee, although not notified, may, if satisfied with the award, intervene, and compel

are to be paid until the mortgage is satisfied, although the debt is not yet due.[1] In case of such payment, the mortgagee must bear his proportion of the benefits assessed against the estate he has.[2] The other doctrine is, that the mortgageor is to recover the full amount of the damages, without regard to the mortgage.[3] This latter doctrine makes the mortgageor the custodian of funds which in fact belong to the mortgagee, who certainly has an interest in the property taken. The New York doctrine is also supported by cases where the mortgagee has foreclosed, and the company have been compelled to value the interest of the mortgagee. In such case the mortgagee would only be entitled to the value of the land, without the structures subsequently placed on it, and in a proper case the foreclosure suit may be stayed until the interest of the mortgagee may be valued.[4] The judgment of foreclosure should direct the offering for sale of the lot, subject to the right of way; and in case the lot, under such sale, would not pay the mortgage-debt, then of the right of way, either with or without the lot.[5] The owner of land encumbered by an

the distribution to him of the proceeds in an amount sufficient to satisfy his encumbrance, especially in a case where the proposed improvement would greatly injure the land; and the railroad company is entitled to relief, and a distribution of the fund paid, so as to protect its rights in the premises. Platt *v.* Bright, 29 N. J. Eq. 128.

[1] John and Cherry Sts., 19 Wend. 659.

[2] Astor *v.* Hoyt, 5 Wend. 603.

[3] Breed *v.* Eastern R. R., 5 Gray, 470; Schuylkill Co. *v.* Thoburn, 7 Serg. & R. 411; Meacham *v.* Fitchburg R. R., 4 Cush. 291.

[4] Kennedy *v.* Milwaukee R. R., 22 Wis. 581.

[5] Severin *v.* Cole, 38 Iowa, 463. In Rhode Island, in the case of Warwick Institute *v.* City of Providence, not yet reported, the mortgagee sold the balance of the lot not taken, without obtaining sufficient to satisfy his claim. He was then allowed to foreclose his mortgage on the strip taken for the highway. The English rule requires the payment to the mortgagee, and if the mortgage is thus paid off before the stipulated time, there is to be an additional compensation for the costs of the reinvestment of the money, and compensation for the loss sustained by such reinvestment. An entry without ascertaining and securing the value of the mortgagee's interest is unlawful, and may be restrained by injunction. Ranken *v.* East and West India Docks Rail Co., 12

easement of a right of way may recover the value, subject to the easement.[1] A judgment-creditor has a lien against land, but not an estate or proprietary interest in it. The lien is a creature of the legislature, and may be abolished at any time; and a lien may be superseded by proceedings of condemnation had before the judgment had ripened into a title, and the legislature may so declare, and confer on the corporation the right to the land, free from all such liens, on payment of the value of the land to the owner.[2] This doctrine is supported in Indiana,[3] although by a divided court. The law which gives a judgment-creditor a lien on the real estate of the debtor relates solely to the remedy, and there can be no vested right in a remedy. The judgment-creditor may have rights to the money paid, as between himself and the debtor, but on payment of the compensation to the owner of the land the title passes, free of liens. The opinion was rendered by Worden, J., and concurred in by Howk and Perkins, JJ. Biddle, C. J., dissented, holding that previous liens on the land were vested rights, which could not be taken without just compensation. Niblack, J., doubted. In a recent case in Illinois,[4] it is held that payment to an attaching creditor, who has attached the interest of a party and obtained judgment, is a payment to the party interested, in accordance with the statute.

§ 75. **Legal and equitable titles — Trustees and cestuis que trust — Receivers — Guardians.** — There is no inflexible rule of law that requires the court to shut its eyes to the real interests of the parties claiming land, or to their sub-

Beav. 298. The case of Hooker *v.* Martin, 17 N. Y. Sup. Ct. 302, holds that where a portion of mortgaged premises is taken, and at the time of the foreclosure the damages have not yet been paid, the court may direct the payment of the damages to the mortgageor, and a foreclosure and sale for the balance only. The condemning party cannot be dispossessed by the foreclosure.

[1] Tufts *v.* Charlestown, 4 Gray, 537.

[2] Watkins *v.* New York Central R. R., 47 N. Y. 157.

[3] Gimble *v.* Stolte, Admrx. (Sup. Ct. Ind.), 6 Cent. L. J. 358.

[4] Chicago R. R. *v.* Chamberlain, 84 Ill. 333.

stantial rights and equities in relation to each other. It will not order the payment of damages to one holding a naked legal title, when another party was entitled to a deed before the taking, and had a good equitable, but not legal, title, and will not compel the equitable owner to an additional action to charge the holders of the legal title as trustees for the holders of the equitable title.[1] It is proper to join *cestui que trust* with trustee, in proceedings,[2] and the owner with one to whom has been given a bond for a deed.[3] Equitable owners are held not necessary parties in proceedings to value land.[4] They certainly have the right to intervene and claim a hearing on the distribution of the fund; and it seems that the proposition should follow, that if they had a right to the fund, they should be heard on the assessment of the amount of their interests. When land is in custody of a receiver, or guardian of lunatic, application should be made to the court having charge of said estates, before compulsory proceedings are had.[5]

§ 76. **Unknown owners — Conflicting claims — Payment into court.** — The party condemning must find out the correct owners of the property, for a payment to one not the owner does not operate as a solution of the damages.[6] Statutes generally provide a method of procedure where the owners are unknown, or where there are conflicting claims, or where the land is encumbered by liens. In the absence of such provisions, the money may be paid into court for the benefit of all the claimants.[7] The money paid in represents the fee, and when deposited belongs to the true owners, and

[1] Pinkerton v. Boston R. R., 109 Mass. 527.

[2] Reed v. Hanover Branch R. R., 105 Mass. 808.

[3] Proprietors of Locks v. Nashua R. R., 10 Cush. 385.

[4] Hidden v. Davisson, 51 Cal. 138; The State v. Easton R. R., 36 N. J. L. 181.

[5] *Re* Taylor, 6 Eng. Rail. Cas. 741; *Re* Brown, 1 Mac. & G. 201.

[6] Hagar v. Brainard, 44 Vt. 294.

[7] Wiggin v. Mayor, 9 Paige, 16; Philadelphia v. Dyer, 41 Pa. 463; Muire v. Falconer, 10 Gratt. 12.

is to be distributed according to the ownership of the land.[1] The commissioners assessing the damages to the land taken are not to pass on the validity of the conflicting claims.[2] After the money is paid into court, the company paying it can have no further interest in the contest, and cannot appeal.[3] There is no occasion for appeal, because the court will see to the proper distribution of the fund.[4] When the entire amount is paid in, it does not signify that owners of some interests have not been notified.[5] All claims are discharged by the payment.[6] If the company fail to pay, the old actions still remain. The only defence must be payment.[7] The court, in distributing the fund, will examine into the various titles and claims, and require unknown owners to make their proofs of right,[8] and may require the claimants to make publication of notice of their application, and to give security in case the real owner is subsequently found.[9] Owners claiming by unrecorded deeds cannot enjoin construction, when they knew of the entry and gave no notice of ownership.[10] They may be entitled to compensation, but not to such a harsh measure as an injunction, when they are principally in fault in causing the failure to pay

[1] Matter of New York Central R. R., 60 N. Y. 116; Ross *v.* Adams, 28 N. J. L. 160. When the interests in the lots were undivided ones of several different owners, and there were adverse conflicting claims, by tax-titles, attachments, and judgment-liens, it is proper to report the compensation to which the owners of each particular lot were entitled, leaving it for the court to determine in regard to the rights of the respective claimants to the money awarded. Chicago R. R. *v.* Chamberlain, 84 Ill. 333.

[2] Ross *v.* Elizabethtown R. R., 20 N. J. L. 280; McIntire *v.* Easton R. R., 26 N. J. Eq. 425.

[3] Haswell *v.* Vermont Central R. R., 23 Vt. 228; Van Vorst, *ex parte*, 2 N. J. Eq. 292.

[4] Columbia Bridge Co. *v.* Geisse, 34 N. J. L. 268; McIntire *v.* Easton R. R., 26 N. J. Eq. 425; Reese *v.* Addams, 16 Serg. & R. 40.

[5] Tide-Water Co. *v.* Archer, 9 Gill & J. 479.

[6] Philadelphia *v.* Dyer, 41 Pa. 463.

[7] Fisher *v.* New York, 57 N. Y. 344.

[8] Fisher *v.* New York, 57 N. Y. 344; Noble St., 1 Ashm. 276.

[9] Matter of Art St., 20 Wend. 685.

[10] Pickert *v.* Ridgefield Park R. R., 25 N. J. Eq. 316.

compensation by concealing from the company their ownership and claim for damages. The English Lands Clauses Consolidation Act, 8 Vict., c. 18, § 54, provides that "the purchase-money or compensation to be paid for any lands to be purchased or taken by the promoters of the undertaking from any party who, by reason of absence from the kingdom, is prevented from treating, or who cannot after diligent inquiry be found, or who shall not appear at the time appointed for the inquiry before the jury as hereinbefore provided for, after due notice thereof, and the compensation to be paid for any permanent injury to such lands, shall be such as shall be determined by the valuation of such able practical surveyor as two justices shall nominate as hereinafter mentioned," and the amount awarded is to be invested in bank for the owner.

§ 77. **Duty of condemning party to ascertain ownership of property taken.** — The statutes may require the condemning party to ascertain and set out the names of owners. The assessment of damages should appear in the report to have been made to the parties entitled, by name, for the confirmation of the report is in the nature of a judgment in favor of that party. The condemning party can certainly go to the records, for the recording of a deed imparts notice of ownership.[1] The party in possession should be considered, because adverse possession may have ripened into title, and such owner be entitled to compensation. The presumption is certainly in his favor as between him and the condemning party,[2] and he is entitled to compensation before dispossession, notwithstanding the commissioners reported that the title was claimed by other parties.[3]

[1] Curran *v.* Shattuck, 24 Cal. 427.

[2] Hawkins *v.* County Commissioners, 2 Allen, 254; Trustees *v.* Worcester, 1 Metc. 437; St. Paul R. R. *v.* Matthews, 16 Minn. 341; Missouri R. R. *v.* Owen, 8 Kan. 409.

[3] Sacramento R. R. *v.* Moffatt, 7 Cal. 577.

The payees who are to receive the compensation are entitled to know with certainty the amounts set apart to them individually, and cannot be put off with an order to pay "to the owner or occupant, or to the person entitled thereto."[1] An assessment to A. B. and others is bad, for each name should be set out,[2] especially when objection is made by such owner;[3] and if an owner is omitted, the report will be set aside.[4] The use of such expressions as "estate of ——," "burying-ground," "descendants of J. C., deceased," "Cornelia Jackson's trustee," "estate of Cowenhoven," "unknown owners," "heirs and devisees," etc., is not sufficient.[5] The names of owners petitioning for a highway must be given in full, and it is not sufficient compliance to sign with initials, or with firm-names.[6] The petition may be amended so as to show ownership of tracts when all parties have been served.[7]

[1] Lull *v.* Curry, 10 Mich. 397.
[2] The State *v.* Oliver, 24 N. J. L. 129.
[3] Roberts *v.* Williams, 15 Ark. 43.
[4] The State *v.* Bennett, 25 N. J. L. 329.
[5] Matter of Flatbush Avenue, 1 Barb. 286; Hughes *v.* Sellers, 34 Ind. 337; The State *v.* Blauvelt, 33 N. J. L. 36; Poston *v.* Terry, 5 J. J. Marsh. 220.
[6] Vawter *v.* Gilliland, 55 Ind. 278.
[7] Hedrick *v.* Hedrick, 55 Ind. 78.

CHAPTER IX.

OF THE RIGHTS OF RIPARIAN OWNERS.

§ 78. Interference with tide-waters.
79. Rights of riparian owners.
80. Improvement of navigable rivers.
81. Diversion of streams — Improvement of streams not navigable.
82. Rights between low and high-water mark.
83. Rights of owners on lakes and great ponds.

§ 78. **Interference with tide-waters.** — An interference with tide-waters can only be justified by legislative grant. The legislative authority prevents the action from being unlawful, but does not protect from the damages resulting to owners of property injuriously affected by a structure interfering with the flow of tide-waters.[1] The legislature may authorize a bridge across tide-waters. If a riparian owner is inconvenienced or disturbed by impeding the access to his property on account of the obstruction of the bridge, the damage arising is from a partial impediment of a public right, and the damage resulting is of the nature that the general public suffers, and compensation is not provided for such damage.[2] A riparian owner has no right which is greater than that of others to have vessels in the stream tied to his bank.[3] Damages for interfering with the flow of tide-waters can be obtained in action on the case.[4]

[1] Lee *v.* Pembroke Iron Co., 57 Me. 481 (qualifying Parker *v.* Cutler Mill-Dam, 20 Me. 353).

[2] Fitchburg R. R. *v.* Boston R. R., 8 Cush. 58; O'Brien *v.* Norwich R. R., 17 Conn. 372.

[3] Boston R. R. *v.* Old Colony R. R., 12 Cush. 605.

[4] Rogers *v.* Kennebec R. R., 35 Me. 319.

§ 79. **Rights of riparian owners.** — Among the rights of a riparian owner, whether he owns to the centre of the river or to the bank,[1] is that of access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or the use of the public, subject to reasonable regulations.[2] The property fronting on the river cannot be taken without compensation,[3] or his right to land against his own land be interfered with by the erection of a bridge, railroad, or other structure.[4] He also owns the accretions to the soil, although a street may have been established on the bank;[5] and he is entitled to damages for interference with the deposit of sediment upon his land, although the embankment diminishing the deposit is not all on his land.[6] He is entitled to the customary flow of the water, and a diversion of the water for the supply of water-works is a damage requiring compensation.[7] A city owning land bordering on a river cannot take therefrom water sufficient to supply the town, three or five miles distant. The use sanctioned by the common law is that of water sufficient to supply the wants of a riparian owner and his family.[8] Such a water-supply may properly be condemned by a municipal corporation.

[1] Lehigh Valley R. R. *v.* Trone, 28 Pa. 206. In Pennsylvania, the riparian owner owns only to the margin, and has no exclusive rights in the soil or water of the river.

[2] Yates *v.* Milwaukee, 10 Wall. 497; Railroad Co. *v.* Schurmeir, 7 Wall. 272; Chapman *v.* Oshkosh R. R., 33 Wis. 629; Hickok *v.* Hine, 23 Ohio St. 523; *Re* Cooling, 19 L. J. (Q. B.) 25. Riparian owner possesses the right of constructing suitable landings and wharves for the convenience of commerce and navigation, and to extend such constructions out into the river to the point of navigability. Rippe *v.* Chicago R. R., 23 Minn. 18.

[3] Chicago R. R. *v.* Stein, 75 Ill. 41.

[4] Hickok *v.* Hine, 23 Ohio St. 523; Bell *v.* Hull Rail. Co., 6 Mee. & W. 699.

[5] Banks *v.* Ogden, 2 Wall. 57. This right may be regulated by statute. The case of Baltimore Railroad *v.* Chase, 43 Md. 23, gives interesting rules in case of irregular fronts.

[6] Concord R. R. *v.* Greely, 23 N. H. 237.

[7] Burden *v.* Stein, 27 Ala. 104; Shamleffer *v.* Peerless Mill Co., 18 Kan. 24.

[8] Stein *v.* Burden, 24 Ala. 130.

After that supply is taken, the owner may use the water remaining, for his mill, or any other purpose not interfering with the public easement.[1] No damages will be allowed to owners near the river who are injured by a use of the waters of the river by a corporation making a public improvement, by which use the waters are rendered unfit for the manufacture of beer.[2] Access to the sea from one's residence is a valuable privilege, and an interference with the same requires compensation.[3]

§ 80. **Improvement of navigable rivers.** — Navigable rivers are public highways. They may be altered, deepened, and improved, and their channels changed, and damages resulting from such improvement are not proper subjects of compensation, resembling in that respect the damages resulting from repairs and improvements of ordinary highways.[4] Damages resulting to individuals from changes in navigable rivers, caused by private corporations not engaged in improving the river for purposes of navigation, require compensation.[5] Dredging the bed of a stream is a proper improvement of a public highway, although the riparian owner may be compelled to deepen the river in front of his land in order to have the same water-front as before.[6] The improvement of the river may destroy fords,[7]

[1] Kane v. Baltimore, 15 Md. 240.

[2] Rex v. Bristol Dock Co., 12 East, 429.

[3] Regina v. Rynd, 16 I. R. C. L. 29 (qualifying Falls v. Belfast & Ballymena Rail. Co., 12 Irish L. R. 238).

[4] Thompson v. Androscoggin Improvement Co., 54 N. H. 545; The People v. Canal Appraisers, 33 N. Y. 461; Lansing v. Smith, 8 Cow. 146; s. c., 4 Wend. 9; Canal Appraisers v. The People, 17 Wend. 571; Tinicum Co. v. Carter, 61 Pa. 21; McKeen v. Delaware Division Canal, 49 Pa. 424; Homochitto River v. Withers, 29 Miss. 21; Chicago R. R. v. Stein, 75 Ill. 41; Hollister v. Union Co., 9 Conn. 436.

[5] Ten Eyck v. Delaware Canal, 18 N. J. L. 200; McKeen v. Delaware Division Canal, 49 Pa. 424.

[6] Holton v. Milwaukee, 31 Wis. 27.

[7] Zimmerman v. Union Canal Co., 1 Watts & S. 346.

fisheries,[1] springs,[2] and bridges,[3] and the damage will be *damnum absque injuria*. These improvements should be confined to the bed of the stream;[4] and there is a growing inclination to hold that any change in the banks of the stream, which operates to throw water, earth, sand, or other material on real estate, or the erection of any structure which effectually impairs the usefulness of the land, is a taking of the land, within the meaning of the constitutional protection, although it may be done in the course of the improvement of a navigable river.[5] Certainly a new channel cannot be constructed so as to cut off the riparian owner from access to the river,[6] although done by establishing a new wharf-line at a distance from the navigable part of the river.[7]

§ 81. **Diversion of streams — Improvement of streams not navigable.** — The diversion of a stream from its natural channel into an artificial one, or changing the course by an embankment, is a taking of the private property of the individual, although such improvement is made with skill and care. The injury is none the less because the work was performed with skill and care.[8] Ancient natural streams or drains may be reopened without compensation to those affected thereby.[9] Owners have a right to the accustomed flow of streams not navigable. Public improvements should provide sufficient culverts, bridges, etc., to accommodate

[1] Shrunk *v.* Schuylkill Co., 14 Serg. & R. 71.

[2] The Commonwealth *v.* Fisher, 1 Pa. 462.

[3] Bailey *v.* Philadelphia R. R., 4 Harr. 389.

[4] Pettigrew *v.* Evansville, 25 Wis. 223.

[5] Pumpelly *v.* Green Bay Co., 13 Wall. 166; Avery *v.* Fox, 1 Abb. U. S. 246; Yates *v.* Milwaukee, 10 Wall. 497; Ten Eyck *v.* Delaware Canal, 18 N. J. L. 200.

[6] Avery *v.* Fox, 1 Abb. U. S. 246; Gardner *v.* Newburgh, 2 Johns. Ch. 162; Water Commissioners *v.* Van Cortlandt, 4 Edw. Ch. 545.

[7] Yates *v.* Milwaukee, 10 Wall. 497.

[8] Tinsman *v.* Belvidere R. R., 26 N. J. L. 148; Gardner *v.* Newburgh, 2 Johns. Ch. 162; Little *v.* Dublin & Drogheda Rail. Co., 7 I. R. C. L. 82; Regina *v.* North Midland Rail. Co., 2 Eng. Rail Cas. 1; Ferrand *v.* Corporation of Bradford, 21 Beav. 412; Bottoms *v.* Brewer, 54 Ala. 288.

[9] Avery *v.* Police Jury, 12 La. An. 554.

the flow of such streams; and if it becomes necessary to flow lands in order to carry out the public improvement, the damages resulting should be paid.[1] It is not absolutely necessary to leave the stream exactly as it was before,[2] but the alteration must be skilfully done and afterward maintained.[3] A change in the course of a stream below a bridge erected, by which change the banks are washed in a different manner, will not justify damages if the work is skilfully performed; otherwise, if the improvement causes the water to flow back, or be obstructed in its flow.[4] Damages resulting from a necessary obstruction are presumed to have been considered in condemnation proceedings, if such have been had, but those arising from an unnecessary obstruction are to be obtained by a subsequent action of tort.[5] A change in a stream not navigable, by which such stream is rendered navigable, impairs the rights of riparian owners, and the damages resulting therefrom must be paid to the owners.[6] The legislature cannot by act declare a private stream public, and take away the rights of riparian owners, without compensation;[7] and cannot open a stream, and remove a dam which has been placed there under legislative sanction, without providing for damages suffered by the owners.[8] No damages will be allowed for diversion of subterraneous streams.[9] For diversion of streams and springs

[1] March *v.* Portsmouth R. R., 19 N. H. 372; Hatch *v.* Vermont Central R. R., 25 Vt. 49; Rowe *v.* Granite Bridge Co., 21 Pick. 344; The People *v.* Kingman, 24 N. Y. 559.

[2] Rowe *v.* Granite Bridge Co., 21 Pick. 344.

[3] Cott *v.* Lewiston R. R., 36 N. Y. 214; Brown *v.* Cayuga R. R., 12 N. Y. 487; Robinson *v.* New York R. R., 27 Barb. 512.

[4] Henry *v.* Vermont Central R. R., 30 Vt. 638; Norris *v.* Vermont Central R. R., 28 Vt. 99.

[5] Estabrooks *v.* Peterborough R. R., 12 Cush. 224; Robinson *v.* New York R. R., 27 Barb. 512; Baltimore R. R. *v.* Magruder, 34 Md. 79.

[6] White Deer Creek Co. *v.* Sassaman, 67 Pa. 415; The State *v.* Glen, 7 Jones L. 321.

[7] Morgan *v.* King, 35 N. Y. 454; *s. c.*, 18 Barb. 277; Walker *v.* Board of Public Works, 16 Ohio, 540.

[8] Glover *v.* Powell, 10 N. J. Eq. 211.

[9] Galgay *v.* Great Southern Rail. Co., 4 I. R. C. L. 456; Acton *v.* Blundell,

the action should be at law for damages, and not in equity to restrain the construction of the works.[1]

§ 82. **Rights between low and high-water mark.** — The bank of a river between low and high-water mark belongs to the sovereign, and may be used for public purposes without compensation to the riparian owner. A railroad may be constructed by legislative authority between low and high-water mark, although the communication of the riparian owner with the river is cut off, except over the railroad. The rights of a riparian owner below high-water mark are the same as the rest of the public, and these public rights may be controlled by the legislature without compensation, any more than is made for the improvements of an ordinary highway.[2] In Pennsylvania, the civil law is followed, and the riparian owner is held to own to low-water mark, and may have compensation from a railroad for a spring between low and high-water mark, cut off by construction of the railroad.[3]

The owner of land on an inland tide-water river has an absolute title to the soil to the high-water line, qualified to the low-water line by the public right of navigation. The owner cannot be compelled to improve the land between low and high-water mark, for the benefit of navigation. The state may do it, but not at the owner's expense. After improvements have been made by the state, the duty of repair falls upon the owner; and in case of neglect, the expense of repair may be charged against him.[4] A riparian proprietor

12 Mee. & W. 824; New River Co. *v.* Johnson, 29 L. J. (M. C.) 93; Chasemore *v.* Richards, 29 L. J. (Exch.) 81.

[1] Stainton *v.* Metropolitan Board of Works, 26 L. J. (Ch.) 800.

[2] Gould *v.* Hudson River R. R., 6 N. Y. 522 (affirming *s. c.*, 12 Barb. 616); Stevens *v.* Paterson R. R., 34 N. J. L. 532; Ingraham *v.* Chicago R. R., 34 Iowa, 249; Tomlin *v.* Dubuque R. R., 32 Iowa, 106. Beck, J., dissenting, claiming the right of the riparian owner to establish mills on the bank of a river, with free access to the stream.

[3] Lehigh Valley R. R. *v.* Trone, 28 Pa. 206 (qualifying The Commonwealth *v.* Fisher, 1 Pa. 462).

[4] Philadelphia *v.* Scott, 81 Pa. 80.

who has lawfully entered the water for the construction of a breakwater cannot thereby acquire title in fee to the land occupied by such breakwater beyond his original boundary; nor can he, in a proceeding for compensation for the alleged taking of such land, recover for any injury done to the breakwater.[1]

§ 83. **Rights of owners on lakes and great ponds.** — The owner whose land borders on a lake or great pond has a right to the use of the waters as a water-supply, a mill-pond, or an ice-pond, and any diversion of water from the lake is a proper subject of damages.[2] In Massachusetts, great ponds are considered public property, and the riparian owner cannot claim damages for water drawn off by an aqueduct company, under legislative authority.[3]

[1] Diedrich *v.* North-Western R. W., 42 Wis. 248.
[2] Trustees *v.* Dennett, 9 N. Y. Sup. Ct. 669.
[3] Fay *v.* Salem County, 111 Mass. 27.

CHAPTER X.

OF THE REMEDIES PROVIDED BY THE STATE AND OPEN TO THE OWNER.

§ 84. Remedy to be provided by the legislature.
85. The assessment of damages under judicial control.
86. Disqualification of court on account of interest.
87. Statutory remedy is exclusive.
88. Where the statutory remedy is not complete, the common-law remedy survives.
89. The initiative in proceedings — Where the condemning party alone may institute proceedings — Where the owner alone may institute — Where either party may institute.
90. Remedy of owner, where condemning party does not follow statutory remedy.
91. Not necessary that the assessment should be by a jury.
92. Rules governing proceedings — Open and close — Change of venue — References — Due process of law.
93. Effect of subsequent legislation on proceedings — Reversal of proceedings.

§ 84. **Remedy to be provided by the legislature.** — The legislature may prescribe the terms, conditions, and methods by which the compensation to be paid on a taking of private property for public use should be ascertained. The proceedings are in the nature of an inquisition on the part of the state, and are necessarily under its control. The original *ad quod damnum* proceeding was a writ issued at the mere motion of the sovereign himself, to inform his conscience, and was an *ex parte* proceeding.[1] It is the duty of the state to see that the estimates made are just, not merely to the individual whose property is taken, but also to the public, which is to pay for it.[2] No particular mode is prescribed

[1] Chesapeake Canal Co. v. Union Bank, 4 Cranch C. Ct. 75.
[2] Garrison v. New York, 21 Wall. 196.

by which the amount of compensation is to be ascertained. That may be submitted to any impartial tribunal the legislature may designate.[1] It is not absolutely necessary that the owner should have an opportunity of appearing before the tribunal. It is not necessary to invest the proceedings with the forms or substance of legal process. The act may allow the owner to intervene, or may leave the whole matter to the discretion of the tribunal.[2] The legislature has control over the remedy so as to affect pending proceedings and change the remedy,[3] and may provide that claims shall be brought in writing,[4] and within a limited time. Every requisite of a statute, having a semblance of benefit to the owner, must be complied with.[5] The rule is that statutes are to be so construed as not to advance a private and destroy a public interest, but always to advance the public interest, doing as little damage as possible to the private interest.[6]

§ 85. **The assessment of damages under judicial control.** — The sovereign cannot assess the damages in the case of a condemnation by himself; nor can the state, by legislation, fix the amount to be paid.[7] An arbitrary schedule of prices to be paid cannot be established, but there must be a fair appraisement by an independent tribunal.[8] The tribunal must be impartial, and may be a jury, or commis-

[1] Bonaparte *v.* Camden R. R., Baldw. 205; The People *v.* Smith, 21 N. Y. 595.

[2] The People *v.* Smith, 21 N. Y. 595.

[3] Springfield R. R. *v.* Hall, 67 Ill. 99.

[4] Hazen *v.* Essex Co., 12 Cush. 475.

[5] Newell *v.* Wheeler, 48 N. Y. 486; Stockett *v.* Nicholson, Walk. (Miss.) 75: Mayor *v.* Delachaise, 22 La. An. 26; New Orleans *v.* Sohr, 16 La. An. 393.

[6] Jerome *v.* Ross, Johns. Ch. 315; Chesapeake Canal Co. *v.* Key, 3 Cranch C. Ct. 599.

[7] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, *per* McLean, J.; Van Horne's Lessee *v.* Dorrance, 2 Dall. 304; Rich *v.* Chicago, 59 Ill. 286; Langford *v.* Commissioners, 16 Minn. 375.

[8] Cunningham *v.* Campbell, 33 Ga. 625; Cox *v.* Cummings, 33 Ga. 549; Kramer *v.* Cleveland R. R., 5 Ohio St. 140.

sioners, or court without a jury;[1] but the legislature cannot appoint the commissioners directly, without consent of or notice to the owners, and without giving an opportunity to the owner to be heard.[2] The corporation condemning cannot be invested with the office of assessing damages or benefits, because that must be done by an impartial tribunal.[3] An assessment may be made by a committee of a city council, if there is a provision that the owner may have a review by the courts on application;[4] but it would be extending too far the control of the city over the proceedings, for the charter to direct that the city attorney should give the jury legal advice concerning their duties whenever required, and that he should draw up their report. That would not give the owner equal privileges with the party condemning.[5] The amount cannot be fixed by the sworn statement of the agent of the company and of two disinterested freeholders. Such a method is an evasion, is *ex parte* and secret, and one of the members of the body is interested in the event.[6] It would be improper to provide that the city council should nominate the jury for the condemnation of land for street-openings.[7] The legislature cannot declare a leasehold or franchise forfeited, and authorize a reëntry. These interests are property, and cannot be taken except on payment of compensation judicially ascertained.[8] A city ordinance cannot divest the title to property *ex proprio vigore*. This can only be done by judicial proceedings.[9] The tribunal need not be from the county in which the land lies, but may be from another county.[10]

[1] Ames v. Lake Superior R. R., 21 Minn. 241.
[2] Langford v. Commissioners, 16 Minn. 375; Heyneman v. Blake, 19 Cal. 579.
[3] Hessler v. Drainage Commissioners, 53 Ill. 105.
[4] McMicken v. Cincinnati, 4 Ohio St. 394.
[5] Paul v. Detroit, 32 Mich. 108.
[6] Powers v. Bears, 12 Wis. 213.
[7] Lumsden v. Milwaukee, 8 Wis. 485.
[8] McCauley v. Weller, 12 Cal. 500; Powell v. Sammons, 31 Ala. 552.
[9] San Francisco v. Scott, 4 Cal. 114.
[10] The People v. Lake Co., 33 Cal. 487.

§ 86. **Disqualification of court on account of interest.** — A judge cannot act in a cause to which he is a party, or where he has an interest in one of the parties to the controversy, — as, where he is a stockholder in a corporation condemning.[1] If the judge or person presiding over the inquiry has no personal interest in the controversy, he may preside notwithstanding he is a nominal party to the proceedings. Although proceedings for street-openings may be brought in the name of the mayor of the city, yet the mayor may summon the jury and preside over the hearing. In that matter he is an executive officer, simply. The jury pass on the question of damages. His position, summoning the jury, could not make him exercise judicial functions. He is also not disqualified for the reason that a portion of the land condemned belonged to him.[2] Commissioners laying out highways are not judges in their own causes, although the highways may be partly on their own lands. The rule preventing a judge from acting in his own cause applies to judges *eo nomine* sitting in the trial of causes.[3] A judge is not incompetent to appoint commissioners because he had been employed in surveying the route, nor because he had expressed an opinion that the road was unnecessary, nor because he had once been a member of the town committee. These matters do not affect the assessment of the amount of damages.[4]

§ 87. **Statutory remedy is exclusive.** — The legislature ordinarily provides by general laws for the condemnation of property and the assessment of damages, and it is not necessary that each taking should be by a separate legislative act.[5] When the remedy provided by statute is complete, the common-law remedy is superseded by the statute,

[1] Giesy *v.* Cincinnati R. R., 4 Ohio St. 308.
[2] Lexington *v.* Long, 31 Mo. 369.
[3] Foot *v.* Stiles, 57 N. Y. 399.
[4] Readington *v.* Dilley, 24 N. J. L. 209.
[5] Backus *v.* Lebanon, 11 N. H. 19.

and the person injured must pursue the course pointed out by the act. The statutory remedy is not merely cumulative upon the common-law action, but an entire substitution for it, and must be exclusively pursued.[1] The rule of construction is the same as of the construction of a statute which creates a new offence, gives a penalty, and directs how it shall be recovered. In such cases the statutory remedy can alone be followed.[2] The state can only be sued by permission; and when property is condemned by the state, the legislature can provide the manner of ascertaining the damages, in exclusion of all other remedies.[3] The owner is entitled to compensation only in the manner provided by law; and if he fails to ask for compensation, or fails to apply in time, or his application is unsuccessful in showing his right thereto, he cannot resist the appropriation simply because his compensation has not been paid. He should persist in a proper maintenance of his suit as provided by statute, and should appeal in case of error.[4] The condemning party must strictly follow the statute, or the appropriation may be enjoined.[5] If the statute does not show an intention to make the statutory remedy exclusive, and does not negative the idea that the common-law remedy shall be used, the statutory remedy is considered cumulative.[6]

[1] Lindell's Administrator *v.* Hannibal & St. Joe R. R., 36 Mo. 543; Stevens *v.* Middlesex, 12 Mass. 466; Calking *v.* Baldwin, 4 Wend. 667; Spring *v.* Russell, 7 Me. 273; Hovey *v.* Mayo, 43 Me. 322; Mason *v.* Kennebec R. R., 30 Me. 215; Henniker *v.* Contoocook R. R., 29 N. H. 146; Aldrich *v.* Cheshire R. R., 21 N. H. 359; Flagg *v.* Worcester, 13 Gray, 601; Perry *v.* Worcester, 6 Gray, 544; Heard *v.* Middlesex Canal, 5 Metc. 81; Gedney *v.* Tewksbury, 3 Mass. 307; Koch *v.* Williamsport Co., 65 Pa. 288; Spangler's Appeal, 64 Pa. 387; McKinney *v.* Monongahela Nav. Co., 14 Pa. 65; McIntire *v.* Western R. R., 67 N. C. 278; Fuller *v.* Edings, 11 Rich. L. 239; McLauchlin *v.* Charlotte R. R., 5 Rich. L. 583; Brown *v.* Beatty, 34 Miss. 227; Colcough *v.* Nashville R. R., 2 Head, 171; Mitchell *v.* Turnpike Co., 3 Humph. 456; Smith *v.* Chicago R. R., 67 Ill. 191; Little Miami R. R. *v.* Whitacre, 8 Ohio St. 590; Cairo R. R. *v.* Turner, 31 Ark. 494.

[2] Elder *v.* Bemis, 2 Metc. 599.

[3] McKinney *v.* Monongahela Nav. Co., 14 Pa. 65.

[4] Dunlap *v.* Pulley, 28 Iowa, 469; Connolly *v.* Griswold, 7 Iowa, 416.

[5] Commissioners *v.* Humphrey, 47 Ga. 565.

[6] Selden *v.* Delaware Canal Co., 24 Barb. 362; Carr *v.* Georgia R. R., 1 Ga.

§ 88. **Where the statutory remedy is not complete, the common-law remedy remains.** — For an entry on land, or the taking or destruction of property, of another, the common law gave the injured party the remedies of trespass, trespass on the case, or ejectment. These remedies gave the owner complete compensation for the invasion of his rights of property. The statutory remedy which is provided must be complete in ascertaining the damages and securing their payment, or the common-law remedy may be pursued.[1] The provision of a specific mode of ascertaining damages confers no right which did not exist before. The omission of a specific mode leaves the party his common-law right.[2] If the statute only provides a partial remedy, there is a remedy for the remainder at common law.[3] The payment of damages must be secured; and if after condemnation there is a refusal to pay, trespass[4] or ejectment with mesne profits[5] may be maintained. Ejectment will also lie against parties claiming under condemnation proceedings, and exercising rights of ownership over land, although not occupying it, when the compensation has not been paid.[6] An opportunity should also be given to the owner to assert his rights to the property taken; and if this is denied, he may sue in trespass for an entry.[7] If the amount of compensation is ascertained, but the statute provides no means of enforcing the payment, the common-law

524; Atchison R. R. v. Weaver, 10 Kan. 344; Toney v. Johnson, 26 Ind. 382 (qualifying Indiana R. R. v. Oakes, 20 Ind. 9); McCormack v. Terre Haute R. R., 9 Ind. 288; Lafayette R. R. v. Smith, 6 Ind. 249; Conwell v. Canal Co., 2 Ind. 588; Kimble v. Whitewater Canal Co., 1 Ind. 285.

[1] Charles River Bridge v. Warren Bridge, 11 Pet. 420, *per* McLean, J.; Lee v. Pembroke Iron Co., 57 Me. 481; Stevens v. Middlesex Canal, 12 Mass. 466; Cogswell v. Essex Mill Co., 6 Pick. 94; Amoskeag Co. v. Goodale, 46 N. H. 53; Cincinnati v. Coombs, 16 Ohio, 181.

[2] Lee v. Pembroke Iron Co., 57 Me. 481; Comins v. Bradbury, 10 Me. 447; Denslow v. New Haven Co., 16 Conn. 98.

[3] Troy v. Cheshire R. R., 23 N. H. 83.

[4] Jamison v. Springfield, 53 Mo. 224.

[5] McClinton v. Pittsburgh R. R., 66 Pa. 404.

[6] Carpenter v. Oswego R. R., 24 N. Y. 655.

[7] Potter v. Ames, 43 Cal. 75.

action of debt will lie.[1] The owner cannot pursue his claim for damages and also proceed to nullify the action of the commissioners in taking the property. The pursuit of one remedy waives the right to the other.[2]

§ 89. **The initiative in proceedings — Where the condemning party alone may institute proceedings — Where the owner alone may institute — Where either party may institute.** — If the statute leaves the institution of proceedings to assess damages with the condemning party solely, an entry made without taking advantage of the benefits of the act leaves the owner in such a condition that he may bring trespass or ejectment.[3] He may recover his land, or the value of it, and is not compelled to bring a *mandamus* to compel a condemnation.[4] There is no reason why he should not also be entitled to an injunction.[5] The condemning party has abused his rights, and can only claim immunity by showing that his proceedings have been thoroughly regular.[6] When the initiative of the remedy is given to the owner alone, he must pursue his remedy, and the condemning party will not be liable in trespass until refusal to pay the damages assessed, or to give the security required by law.[7] The owner is not required to present his claim with all the regularity and formality required in regular pleadings, but must indicate with reasonable certainty what his claim is.[8] If the initiative is given to either party,

[1] Bigelow *v.* Cambridge Turnpike Co., 7 Mass. 202; Lebanon *v.* Olcott, 1 N. H. 339; Battles *v.* Braintree, 14 Vt. 348.

[2] Pinkham *v.* Chelmsford, 109 Mass. 225.

[3] Atlantic R. R. *v.* Fuller, 48 Ga. 423; Eward *v.* Lawrenceburg R. R., 7 Ind. 711; Sherman *v.* Milwaukee R. R., 40 Wis. 645; Kansas Pacific R. R. *v.* Streeter, 8 Kan. 133; Stein *v.* Burden, 24 Ala. 130; Soulard *v.* St. Louis, 36 Mo. 546; Blesch *v.* Chicago R. R., 48 Wis. 188.

[4] Smith *v.* Chicago R. W., 67 Ill. 191; Shepardson *v.* Milwaukee R. R., 6 Wis. 605.

[5] Harrington *v.* St. Paul R. R., 17 Minn. 215.

[6] Mobley *v.* Breed, 48 Ga. 44.

[7] Davis *v.* Russell, 47 Me. 443.

[8] Martinsville R. R. *v.* Bridges, 6 Ind. 400.

neither can complain that the other did not first begin;[1] and an entry made under legislative authority would not be a trespass,[2] and an injunction would not be allowed to the owner where he might have pursued the statutory remedy and obtained his damages.[3] In most of the states, a strict rule has grown up requiring the payment of compensation before entry. The condemning party, in order to enter, must have paid damages, and must necessarily have ascertained the amount. Hence it has been held, generally, that an entry without payment or tender would furnish the owner sufficient grounds for maintaining trespass,[4] ejectment,[5] or for obtaining an injunction,[6] and that there is no obligation on the part of the owner to institute such proceedings.

§ 90. **Remedy of owner, where condemning party does not follow statutory remedy.** — Should the condemning party follow the statute strictly, he obtains a title to or easement in the property. While pursuing that remedy he is removed from the multiplicity of common-law actions which might otherwise be brought. If the statutory remedy is not strictly followed, no title or easement is obtained, and the condemning party has no defence to the usual common-law actions.[7] The owner may enjoin the entry,[8] either when the company condemning is insolvent,[9] or where, from the

[1] Lindell's Administrator *v.* Hannibal & St. Joe R. R., 86 Mo. 543.

[2] Calking *v.* Baldwin, 4 Wend. 667.

[3] Parham *v.* Justices, 9 Ga. 341.

[4] Loop *v.* Chamberlain, 20 Wis. 135; Crittenden *v.* Wilson, 5 Cow. 165; Ash *v.* Cummings, 50 N. H. 591; Daniels *v.* Chicago R. R., 41 Iowa, 52.

[5] Daniels *v.* Chicago R. R., 35 Iowa, 129.

[6] Bohlman *v.* Green Bay R. R., 30 Wis. 105; Loop *v.* Chamberlain, 20 Wis. 135; *s. c.*, 17 Wis. 504.

[7] Blaisdell *v.* Winthrop, 118 Mass. 138; Ewing *v.* St. Louis, 5 Wall. 413; Peoria R. R. *v.* Schertz, 84 Ill. 135 (1877).

[8] Cameron *v.* Supervisors, 47 Miss. 264; Paris *v.* Mason, 37 Texas, 447; Floyd *v.* Turner, 23 Texas, 292; Pierpoint *v.* Harrisville, 9 W. Va. 215.

[9] Norristown Turnpike Co. *v.* Burket, 26 Ind. 53; Sidener *v.* Norristown

persistency of the officers, it is evident that an injunction will be necessary to avoid a multiplicity of suits of trespass;[1] or the court may order compensation to be made, or a cessation of the use of the condemned property.[2] The owner may bring ejectment,[3] and the pendency of proceedings to condemn will be no defence to the action of ejectment.[4] Although a judgment may be maintained in ejectment or trespass, and the condemning party has paid the mesne profits or the damages, such payment does not operate to pass the title. The action for trespass does not admit that the condemnation was regular, or that any title has passed, and hence the damages paid are not as compensation for the land, but only for the damage up to the time of bringing the suit.[5] The way to settle the compensation and obtain title is under the statute.[6] It has been suggested, and without apparent good reason, that the damages obtained

Turnpike, 23 Ind. 623. The fact that the owner did not enjoin the entry is not a waiver of his action of trespass. Blesch *v.* Chicago R. W., 43 Wis., 183.

[1] Lewis *v.* Rough, 26 Ind. 398; Bonaparte *v.* Camden R. R., Baldw. 205. Ordinarily, injunction will not lie to prevent trespass. Hickerson *v.* Mexico, 58 Mo. 61; Anderson *v.* St. Louis, 47 Mo. 479; Nichols *v.* Salem, 14 Gray, 490; James River Co. *v.* Anderson, 12 Leigh, 278. Injunction will not lie to prevent a trespass, or in aid of an action of trespass, unless it appear that the injury will be irreparable; that pecuniary compensation will be inadequate, or that a multiplicity of suits will thereby be avoided. The fact that the defendant threatens to continue his trespasses is not sufficient, if the defendant is solvent. Thorn *v.* Sweeny, 12 Nev. 251.

[2] Davis *v.* Lacrosse R. R., 12 Wis. 16.

[3] Chicago R. R. *v.* Smith, 78 Ill. 96; Smith *v.* Chicago R. R., 67 Ill. 191; Chicago R. R. *v.* President of Knox College, 84 Ill. 195.

[4] Coburn *v.* Pacific Lumber Co., 46 Cal. 31.

[5] Hartz *v.* St. Paul R R., 21 Minn. 358; Adams *v.* Hastings R. R., 18 Minn. 260; Harrington *v.* St. Paul R. R., 17 Minn. 215. In case of an entry on land for the purpose of constructing a railroad, where the forms of the statute have not been observed, a judgment in trespass in favor of the owner gives the railroad company no title. The verdict and judgment ought not to include the value, but only compensation for such damages to it as the railroad company has perpetrated, increased by such punitive damages as the law might authorize. Anderson R. R. *v.* Kernodle, 54 Ind. 314. These damages are to be recovered down only to the time of bringing the action. Blesch *v.* Chicago R. R., 43 Wis. 183.

[6] Davis *v.* Lacrosse R. R. 12 Wis. 16.

in a suit for trespass should be deducted from the compensation afterward ascertained.[1] The trespass and the condemnation are separate and distinct.[2] The award cannot cover the damages for past trespasses;[3] neither can condemnation proceedings subsequently commenced operate as a bar to actions for previous trespasses.[4] The fact that an action of trespass might be maintained does not prevent a condemnation. That should have been had before the trespass, and certainly can be had afterward.[5] The owner has his remedy at common law for any act done in excess of the statutory powers.[6] One cannot sue a railroad company for rent, who has never consented to their using his land, and has warned them that they went upon it at their peril, and had no right in the soil. Rights adverse to another's cannot be asserted, and at the same time a claim for rent be made, arising out of an alleged tenancy by contract.[7]

§ 91. **Not necessary that the assessment should be by a jury.** — Most of the state constitutions contain a provision that the right of trial by jury shall remain inviolate, and this has been frequently invoked as an insuperable barrier to an assessment of damages, in condemnation proceedings, by a body of less than twelve men. The weight of authority is against this proposition. The persons appointed to assess damages in cases of this kind do not perform the proper

[1] Pomeroy *v.* Chicago R. R., 25 Wis. 641. If damages were assessed at value of property, the recovery would be a bar to further actions of trespass. Soulard *v.* St. Louis, 36 Mo. 546. In Kentucky, but one recovery can be had for damages for running railroad in street, as the lot-owner in effect consents that the railroad may use the street in consideration of the judgment. Jeffersonville R. R. *v.* Esterle, 13 Ky. 667.

[2] Loop *v.* Chamberlain, 17 Wis. 504.

[3] Hursh *v.* St. Paul R. R., 17 Minn. 439; Oregon R. R. *v.* Barlow, 3 Oreg. 311.

[4] Missouri R. R. *v.* Ward, 10 Kan. 352.

[5] Secombe *v.* Milwaukee R. R., 23 Wall. 108.

[6] Broadbent *v.* Imperial Gas Co., 26 L. J. (Ch.) 276; Regina *v.* Bristol R. R., 2 Eng. Rail. Cas. 99.

[7] Marquette R. R. *v.* Harlow, 37 Mich. 554.

and usual functions of a jury, and their number is a matter of discretion with the legislature.[1] Juries are for the trial of issues of fact in civil and criminal proceedings in courts of justice, and are not necessarily required in the assessment of land-damages.[2] The early practice in many of the states, both before and after the adoption of their first constitutions, was to assess the damages by commissioners, instead of a jury, which would indicate that the preservation of the right of trial by jury was to be confined to cases other than those of the condemnation of land.[3] The right to trial by jury is not claimed in equity cases, although rights of property are involved and issues of fact arise. Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury.[4] Later constitutions and legislation secure to the owner the right of assessment of his damages by a jury of twelve men, in a court of record.[5] The constitutional pro-

[1] Lafayette Plank-Road *v.* Pickett, 25 Mo. 535; West River Bridge *v.* Dix, 6 How. 507, *per* Woodbury, J.; Raleigh R. R. *v.* Davis, 2 Dev. & B. 451; Evansville R. R. *v.* Miller, 30 Ind. 209; Ames *v.* Lake Superior R. R., 21 Minn. 241. *Contra*, Day *v.* Stetson, 8 Me. 365; Isom *v.* Mississippi R. R., 36 Miss. 300.

[2] Livingston *v.* Mayor of New York, 8 Wend. 85; The People *v.* Smith, 21 N. Y. 595 (overruling Clark *v.* Utica, 18 Barb. 451); Beekman *v.* Saratoga R. R. 8 Paige, 45; Scudder *v.* Trenton Falls Co., 1 N. J. Eq. 694; Whiteman's Executors *v.* Wilmington R. R., 2 Harr. 514; Houston R. R. *v.* Milburn, 34 Texas, 224; Buffalo R. R. *v.* Ferris, 26 Texas, 588; Hymes *v.* Aydelott, 26 Ind. 431; Dronberger *v.* Reed, 11 Ind. 420; Lake Erie R. R. *v.* Heath, 9 Ind. 558; Norristown Turnpike *v.* Burket, 26 Ind. 53; Johnson *v.* Joliet R. R., 23 Ill. 202; Heyneman *v.* Blake, 19 Cal. 579; Willyard *v.* Hamilton, 7 Ohio, pt. 2, 111.

[3] Van Horne's Lessee *v.* Dorrance, 2 Dall. 304; Mount Washington Road, 35 N. H. 134; Backus *v.* Lebanon, 11 N. H. 19; Baker *v.* Holderness, 26 N. H. 110; Dalton *v.* Northampton, 19 N. H. 362; Gold *v.* Vermont Central R. R., 19 Vt. 478; *In re* Paschall St., 81 Pa. 118; Norristown Turnpike *v.* Burket, 26 Ind. 53.

[4] Koppikus *v.* State Capital Commissioners, 16 Cal. 248.

[5] Mitchell *v.* Illinois R. R., 68 Ill. 286; Paul *v.* Detroit, 32 Mich. 108; Chicago R. R. *v.* Sanford, 23 Mich. 418; Whitehead *v.* Arkansas R. R., 28 Ark. 460; Const. Ark., art. V., § 48; New Const. Pa., art. XVI., part § 8: "And the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury, according to the course of the common law." Pusey's Appeal, 33 Pa. 67; Williams *v.* Pittsburgh, 33 Pa. 71.

vision requiring a trial by jury repeals, to that extent, all former acts and charters allowing compensation to be assessed in other ways, and the condemnation must be by jury.[1] The former acts and charters may be followed in other respects, but in regard to the requirement of a jury-trial the constitution executes itself, without additional legislation.[2]

In order to have the preliminary assessment as inexpensive as possible, the first examination is made, in many states, by commissioners, from whose award there may be an appeal and a trial by jury.[3] This will satisfy the constitutional requirements of a trial by jury. If the owner does not appeal, he is presumed to have abandoned his right to trial by jury.[4] The owner, in appealing for a trial by jury, should not be compelled to give a bond with sureties, as that would fetter the right to trial by jury.[5] On such an appeal, the preliminary proceedings need not be repeated. The object of such an appeal is to have, under proper instructions, a jury-trial of questions of public utility and damages. All irregularities are ordinarily waived by appeal,[6] including the irregularity that the owner was refused the right of trial by jury below.[7] The right of trial by jury may be given below, with a trial by commissioners above, in the discretion of the court.[8]

§ 92. **Rules governing proceedings — Open and close — Change of venue — References — Due process of law.** — In proceedings for the condemnation of land, the owners have the affirmative of the issue as to the value of the land, and

[1] Kine *v.* Defenbaugh, 64 Ill. 291; The People *v.* McRoberts, 62 Ill. 38; Campau *v.* Detroit, 14 Mich. 276.

[2] The People *v.* McRoberts, 62 Ill. 38. *Contra*, Lamb *v.* Lane, 4 Ohio St. 167.

[3] Hord *v.* Nashville R. R., 2 Swan, 497; Norristown Turnpike *v.* Burket, 26 Ind. 53; Sigafoos *v.* Talbot, 25 Iowa, 214.

[4] Steuart *v.* Mayor, 7 Md. 500; Reckner *v.* Warner, 22 Ohio St. 275; Lamb *v.* Lane, 4 Ohio St. 167.

[5] Weir *v.* St. Paul R. R., 18 Minn. 155.

[6] Kemp *v.* Smith, 7 Ind. 471.

[7] Williamson *v.* Cass County, 84 Ill. 361 (1877).

[8] Des Moines *v.* Layman, 21 Iowa, 153.

hence the right to open and close, without regard to which party initiated the proceedings[1] or prosecuted the appeal.[2] In New York, the commissioners decide which party shall have the open and close, and their decision is final.[3] In South Carolina, the appellant has the open and close on appeal.[4] In Georgia, the party originally moving has the open and close on appeal.[5]

A condemnation proceeding may be taken, by change of venue, to another county from that in which the land lies.[6] The party asking for the change thereby waives the right to a jury of view, for the reason that the court cannot send its jury into another county.[7]

An amicable reference is a bar to a further appraisement by commissioners.[8] The majority of arbitrators thus constituted may act.[9] An agreement to arbitrate the matter of damages is binding, and is not within the statute of frauds.[10] The Supreme Court of Maine, pushing to its furthest limit the doctrine that the statutory remedy is exclusive, hold that parties cannot submit the question of damages to referees and recover on their award, although there is a statute providing for the submission to arbitration of matters in dispute.

The Bills of Rights of many of the states contain a

[1] Burt *v.* Wigglesworth, 117 Mass. 302; Minnesota R. R. *v.* Doran, 17 Minn. 188; Oregon R. R. *v.* Barlow, 8 Oreg. 811. It is not such error as to warrant reversal that the court below allowed the corporation to open and close the evidence and argument to the jury. Neff *v.* Cincinnati (Supreme Court Commission, Ohio), 6 Cent. L. J. 156.

[2] Winnisimmet Co. *v.* Grueby, 111 Mass. 543; Connecticut River R. R. *v.* Clapp, 1 Cush. 559.

[3] Albany R. R. *v.* Lansing, 16 Barb. 68.

[4] Charleston R. R. *v.* Blake, 12 Rich. L. 634

[5] Harrison *v.* Young, 9 Ga. 359.

[6] Simmons *v.* St. Paul R. R., 18 Minn. 184.

[7] Rockford R. R. *v.* Coppinger, 66 Ill. 510.

[8] Tunbridge *v.* Tarbell, 19 Vt. 453.

[9] Piper *v.* Connersville Turnpike, 12 Ind. 400.

[10] La Crosse R. R. *v.* Seeger, 4 Wis. 268.

clause that private property shall not be taken "without due process of law."[1] This means the judgment of the law pronounced upon trial, after the matter is judicially ascertained,[2] and does not refer to a taking of private property for public use.[3]

§ 93. **Effect of subsequent legislation on proceedings — Reversal of proceedings.** — The legislature cannot pass an act, with a retroactive effect, providing for the assessment, in a particular way, of damages which had already been suffered. Damages inflicted without legislative sanction could not be for public use, and a subsequent declaration that they were such could not make them so.[4] Proceedings that are pending, instituted under proper authority, may be vacated by subsequent legislation. A new inquisition may be ordered by the sovereign before the first one is concluded. There is nothing in the nature of a contract between the owner and the state, by which the owner has a vested right in the amount awarded, so that a subsequent examination, provided for by subsequent legislation, shall operate as an impairment of the obligation of a contract,[5] even though no appeal were allowed from the award.[6] The repeal of a law operates to render all proceedings void from beginning. It is as if no such law had ever been passed.[7] A subsequent act may provide for a construction to be placed upon a former act, and that the damages shall be thus determined.[8] The remedy may be

[1] Eastman v. Stowe, 87 Me. 86.
[2] Heyward v. Mayor of New York, 7 N. Y. 314.
[3] Jordan v. Hyatt, 8 Barb. 275.
[4] Matter of Townsend, 89 N. Y. 171, Miller, J., dissenting.
[5] Baltimore R. R. v. Nesbit, 10 How. 395; Hampton v. The Commonwealth, 19 Pa. 329.
[6] Garrison v. New York, 21 Wall. 196.
[7] Hampton v. The Commonwealth, 19 Pa. 329; The Commonwealth v. Beatty, 1 Watts, 382.
[8] Yost's Report, 17 Pa. 524; Fenelon's Petition, 7 Pa. 178.

changed to affect pending proceedings, and strike out the allowance of benefits as a set-off to damages.[1] When the report of damages had been confirmed, and the delay was only in paying the damages assessed, the subsequent act could not affect the proceedings,[2] or operate to turn the claimant over to another municipal subdivision for his damages.[3] The reversal of proceedings on appeal does not constitute the party entering under authority of the judgment below a trespasser.[4] The law-making power may not only amend the present remedy, but may even substitute a new one, provided there be no interference with the company's franchise or the citizen's right. The corporation cannot claim that a change in the remedy violates the contract of its charter. The form of the remedy is within the legislative power, and this power cannot be restrained by contract, although the new remedy be less convenient, or less prompt and speedy, than the old. The addition of the right of appeal to the remedy of the owner, where formerly no such right existed, is only an enlarging of the remedy, and not an impairment of the rights of the company.[5]

[1] Springfield R. R. *v.* Hall, 67 Ill. 99.
[2] The People *v.* Supervisors, 4 Barb. 64.
[3] Daley *v.* St. Paul, 7 Minn. 390.
[4] Dussuau *v.* Municipality, 6 La. An. 575.
[5] Appeal of Long (Sup. Ct. Pa.), Chi. Leg. N., Oct. 26, 1878, — not yet reported.

CHAPTER XI.

OF NOTICE OF PROCEEDINGS.

§ 94. Notice not absolutely necessary.
95. Notice generally required, to give jurisdiction.
96. Necessity of notice inferred from provisions of the statute.
97. Appearance—Waiver of notice.
98. Notice by publication and by posting.
99. Reasonable notice.
100. What the notice should contain.
101. Return of service of notices.
102. New notice of new proceedings.
103. Notice to known owners.
104. Notice to unknown owners.

§ 94. **Notice not absolutely necessary.** — It is the rule, generally recognized by all civil governments, to give notice, to the owner, of proceedings which affect the title of property. If the law does not require notice to be given, it has been considered not essential to give notice to the owner.[1] The exigency may be such that the notice must be dispensed with.[2] The condemnation proceedings, being in the nature of proceedings *in rem*, the judgment is conclusive against every party interested, whether notified or not. The seizure is constructive notice. The court obtains jurisdiction over the land seized.[3] Public convenience would not allow proceedings to be set aside for want of notice to individuals.[4] The notice may be given to the party in possession,

[1] Harper *v.* Lexington R. R., 2 Dana, 227; Kramer *v.* Cleveland R. R., 5 Ohio St. 140.

[2] George's Creek Co. *v.* Coal Co., 40 Md. 425.

[3] Wilson *v.* Hathaway, 42 Iowa, 173; Cupp *v.* Commissioners, 19 Ohio St. 173; Stewart *v.* Board of Police, 25 Miss. 479.

[4] Stewart *v.* Board of Police, 25 Miss. 479; New Orleans R. R. *v.* Hemphill, 35 Miss. 17.

although he may not be the true owner. It is not necessary, in these proceedings, to enter into the contest of the title to the fund.[1] Commissioners to assess damages may be appointed without notice to the owner.[2] The general sense of equity and justice requires that notice should be given,[3] and if notice is not required in the statute, all other proceedings will be required to be in the strictest conformity to the statute, or they will be set aside.[4]

§ 95. **Notice generally required, to give jurisdiction.** — Notice to the adverse party is generally required, to obtain jurisdiction,[5] and the failure to give such notice will not be considered waived except by a litigation on the merits.[6] Jurisdiction will be presumed if the record shows that the court decided that sufficient notice had been given.[7] The return of an officer may be disproved, so as to show that notice had not been given as returned by the officer.[8] Where jurisdiction has once attached, the failure to give notices required in subsequent stages of proceedings will not invalidate the subsequent proceedings.[9] The proceedings would be valid to those who had received notice, although invalid as to those who had not.[10] Notices must be given by the proper party; and a city council, when directed to give notice of meetings for condemnation purposes, cannot devolve that

[1] Pitzer *v.* Williams, 2 Rob. (Va.) 241.

[2] Weir *v.* St. Paul R. R., 18 Minn. 155.

[3] Booneville *v.* Ormrod's Admr., 26 Mo. 193.

[4] Hood *v.* Finch, 8 Wis. 381.

[5] Cruger *v.* Hudson River R. R., 12 N. Y. 190; The State *v.* Orange, 32 N. J. L. 49; The People *v.* Supervisors of Allegany Co., 36 How. Pr. 544; Peabody *v.* Sweet, 3 Ind. 514; Peoria R. R. *v.* Warner, 61 Ill. 52; The State *v.* Anderson, 39 Iowa, 274; Robinson *v.* Mathwick, 5 Neb. 252; Commissioner's Court *v.* Bowie, 34 Ala. 461; Molett *v.* Keenan, 22 Ala. 484; Stanford *v.* Worn, 27 Cal. 171; Baltimore *v.* Grand Lodge, 44 Md. 436.

[6] The State *v.* Orange, 32 N. J. L. 49; Cruger *v.* Hudson River R. R., 12 N. Y. 190.

[7] The State *v.* Anderson, 39 Iowa, 274; The State *v.* Prine, 25 Iowa, 231.

[8] Adams *v.* Saratoga R. R., 10 N. Y. 328.

[9] Commissioners of Leavenworth *v.* Espen, 12 Kan. 531.

[10] The State *v.* Easton R. R., 36 N. J. L. 181; Kidder *v.* Jennison, 21 Vt. 108.

duty on their clerk.[1] Proceedings continued without the notice above required are illegal,[2] and on *certiorari* will be quashed.[3]

§ 96. **Necessity of notice inferred from provisions of the statute.** — Where the statute gives the right of an appeal, the legislature must have contemplated that notice should be given to the party whose land was to be taken; otherwise, he could not be benefited, because he might not know of the proceedings until after the time of appeal had elapsed.[4] An act requiring an effort to agree on compensation clearly indicates that the legislature required notice to be given.[5] A statute requiring viewers to hear evidence implies a notice to parties, so that they may produce evidence and contest the finding before the court.[6]

§ 97. **Appearance — Waiver of notice.** — Notice is provided for the purpose of giving opportunity for appearance and contest. The general rule is that the appearance of a party waives the failure to formally notify him,[7] especially if he litigates without entering objection to the sufficiency of the notices.[8] The litigation should probably be on the

[1] The State *v.* Jersey City, 25 N. J. L. 309.

[2] Case *v.* Thompson, 6 Wend. 634; Case *v.* Myers, 6 Dana, 330; Wood *v.* Commissioners, 62 Ill. 391; Seifert *v.* Brooks, 34 Wis. 448; Anderson *v.* Turbeville, 6 Coldw. 150; The People *v.* Kniskern, 54 N. Y. 52; Skinner *v.* Lake View Avenue Co., 57 Ill. 151; Ware *v.* County Commissioners, 38 Me. 492; The People *v.* Supervisors of Allegany Co., 36 How. Pr. 544; Stone *v.* Boston, 2 Metc. 220.

[3] Atlantic R. R. *v.* Commissioners, 51 Me. 36; Joliet R. R. *v.* Barrows, 24 Ill. 562.

[4] Dickey *v.* Tennison, 27 Mo. 378.

[5] Booneville *v.* Ormrod's Admr., 26 Mo. 193; Peoria R. R. *v.* Warner, 61 Ill. 52.

[6] Skinner *v.* Lake View Avenue Co., 57 Ill. 151.

[7] Boston R. R. *v.* Folsom, 46 N. H. 64; Copeland *v.* Packard, 16 Pick. 217; Muire *v.* Falconer, 10 Gratt. 12; East Saginaw R. R. *v.* Benham, 28 Mich. 459; The People *v.* Burton, 65 N. Y. 452; Long Island R. R. *v.* Bennett, 17 N. Y. Sup. Ct. 91.

[8] Parish *v.* Gilmanton, 11 N. H. 293; Barre Turnpike Co. *v.* Appleton, 2 Pick. 430; The Commonwealth *v.* Westborough, 3 Mass. 406; Tingley *v.*

merits. Appearances in answer to a *subpœna* to appear as a witness,[1] or an appearance and an objection to a juror,[2] have been held not to constitute a waiver of notice. That doctrine is rather strict, and is supported by those cases which hold that notice must be given in order to acquire jurisdiction, and that, if this notice is not given, the party would not be estopped by his presence at the proceedings and entering other objections.[3] It certainly is better reasoning to hold that jurisdiction of the party may be obtained by his appearance and entering other objections.[4] It might as well be said that an appearance voluntarily entered by attorney would not be binding because the statute provided for service of notice. Objections to notices should be taken at the earliest possible moment, or such objections will be considered waived.[5] They cannot be made for the first time on appeal.[6] A long acquiescence will prevent a quashing of the proceedings, although one of the parties was *non compos mentis*, and had no guardian.[7] An appearance at an adjourned hearing cures any irregularity in the first adjournment.[8]

§ 98. **Notice by publication and by posting.** — The mode of giving notice is under the control of the legislature, and notice need not be personal, but may be by advertisement, even to resident owners.[9] The common-law notice by personal service cannot be given to non-residents

Providence, 9 R. I. 888; Windsor v. Field, 1 Conn. 279; Polly v. Saratoga R. R., 9 Barb. 449; Pitzer v. Williams, 2 Rob. (Va.) 241.

[1] The People v. Osborn, 20 Wend. 186.

[2] Cruger v. Hudson River R. R., 12 N. Y. 190.

[3] Roehrborn v. Schmidt, 16 Wis. 519; The State v. Langer, 29 Wis. 68.

[4] Milhollin v. Thomas, 7 Ind. 165.

[5] Peavey v. Wolfborough, 37 N. H. 286.

[6] Smith v. Alexander, 24 Ind. 454.

[7] Hancock v. Boston, 1 Metc. 122.

[8] Anderson v. Wood, 80 Ill. 15.

[9] Owners v. Mayor of Albany, 15 Wend. 374; Polly v. Saratoga R. R., 9 Barb. 449; Wilkin v. St. Paul R. R., 116 Minn. 271; Cupp v. Commissioners, 19 Ohio St. 178.

or unknown owners. Hence the only notice possible is the constructive notice which may be given by advertisement in newspapers,[1] by posting,[2] or by mail;[3] and as constructive notice is a creature of statute, that notice may also be dispensed with.[4] The statute may require service of personal notice on owners in actual occupancy; and if not in actual occupancy, by publication.[5] Notice by advertisement should be directed to the person by name, when known. If not known, he may be described as unknown.[6] The posting of notices in public places is a proper means of bringing home notice to the owners of property. This notice must be given strictly according to the statutory requirement, or else the proceedings will be void as to non-residents.[7] If the statute does not require the proof of the posting to be in writing, the record declaring that such notice has been given is presumptive evidence of its having been properly done.[8]

[1] Secombe *v.* Milwaukee R. R., 2 Dill. 469; Wilson *v.* Hathaway, 42 Iowa, 173.

[2] Hildreth *v.* Lowell, 11 Gray, 345; Taylor *v.* Hampden, 18 Pick. 309.

[3] Crane *v.* Camp, 12 Conn. 464.

[4] Johnson *v.* Joliet R. R., 28 Ill. 202; Cowan *v.* Glover, 3 A. K. Marsh. 357.

[5] Hunt *v.* Smith, 9 Kan. 187. In Wisconsin, the owner of the land proposed to be taken, when known and living within the city, should have personal notice of the time and place of the appointment of the jury, and when they will meet to view the premises, in order that he may object to the selection of any unfit person on the jury, and have a full opportunity to be heard before them on the question of necessity. The failure of a city charter to provide for such notice to resident owners renders the proceedings void. Notice by advertisement may properly be given to non-resident owners, but not to resident owners, or those having tenants or resident agents. The State *v.* Fond du Lac, 42 Wis. 287. Where the statute requires service of notice personally on an agent of owner residing in the state, or on the non-resident owner of land personally, wherever he may be, or by publication in a newspaper for six weeks, and by sending to the land-owner by mail, if kn wn and non-resident, if his residence is known, a copy of the petition and notice of hearing, thirty days before the time of presentation, the record should show that there was no resident agent; and a service by mail on a non-resident owner would not be sufficient if the record was silent as to the existence or non-existence of a resident agent. Morgan *v.* Chicago R. R., 86 Mich. 428.

[6] Chicago R. R. *v.* Smith, 78 Ill. 96.

[7] Curran *v.* Shattuck, 24 Cal. 427.

[8] McCollister *v.* Shuey, 24 Iowa, 362; The State *v.* Prine, 25 Iowa, 231.

GEO. J. BOAT.
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Parol evidence of proper posting is also admissible, and it will be presumed that due proof was made before the board of commissioners.[1] In Michigan, the statute required notice by posting on the door of the house where township meetings were usually held, and if there was no usual place, in one of the most public places in the township. Township meetings were held alternately in two places. There was no usual place. The notice was posted on the inner door of a tavern, being one of the most public places in the township. This notice was held to be sufficient.[2]

§ 99. **Reasonable notice.** — Reasonable notice depends to a certain extent on the residence of the owners. When they live in the same town, seven days' notice has been held sufficient.[3] Reasonable notice may be by advertisement published in the county paper,[4] or may be sent by mail to non-residents.[5] When no time of notice is given, it is sufficient that it be served before the return-day. If notice is served before the return-day, it devolves upon the owner to show the insufficiency of the notice.[6] Where the owner lived within eighty rods of land, and received notice the day previous to the hearing, and requested no delay, but contested the condemnation on other grounds, he could not except as to sufficiency of notice.[7] Notice ordinarily means notice in writing.[8]

§ 100. **What the notice should contain.** — The notices given should follow strictly the requirements of the statute, or they will be unavailing. The notice should inform the

[1] Woolsey *v.* Hamilton County, 32 Iowa, 180.
[2] The People *v.* La Grange, 2 Mich. 187.
[3] Trustees *v.* Salmond, 11 Me. 109.
[4] Freetown *v.* Bristol, 9 Pick. 46.
[5] Crane *v.* Camp, 12 Conn. 464.
[6] Muire *v.* Falconer, 10 Gratt. 12.
[7] Williams *v.* Hartford R. R., 13 Conn. 397.
[8] Gilbert *v.* Turnpike Co., 3 Johns. Cas. 107; Vail *v.* Morris R. R. 21 N. J. L. 189.

owners how they are to be affected, and hence should contain a description of the land.[1] The notices posted need not be signed by any one.[2] A statute requiring notice of the time and place where commissioners would meet "to decide upon application" for a road is not satisfied by a notice of a meeting of commissioners "to take into consideration the application" for a road. It would not follow that the commissioners would decide at that meeting.[3] A statute required an advertisement to non-residents, and that such advertisement should recite the substance of the petition. Under such statute it would not be necessary to set out the entire petition. It would be sufficient to give notice that an application would be made to the court on a certain day to appoint commissioners to view and assess damages which the owner might sustain in consequence of the establishment, erection, and maintenance of the railroad over the land of the owner, which was particularly described.[4] A notice will not be vitiated because it erroneously stated that some of the improved lands were unimproved.[5] A statute requiring notice of the time when application will be made for the "appointment of commissioners" is satisfied by notice for the establishment of a road.[6] If the statute requires the publication of the application, and this is omitted, the notice is not sufficient to give jurisdiction.[7]

§ 101. **Return of service of notices.** — The court passes on the correctness and validity of notices;[8] and the court can judge from the returns on the notices, better than from the testimony or affidavits of witnesses, that the notices

[1] The State v. Elizabeth, 32 N. J. L. 357.
[2] Wright v. Wells, 29 Ind. 354.
[3] Babb v. Carver, 7 Wis. 124; Austin v. Allen, 6 Wis. 134.
[4] Quincy R. R. v. Taylor, 48 Mo. 35.
[5] Snyder v. Trumpbour, 38 N. Y. 355.
[6] Woolsey v. Hamilton County, 32 Iowa, 130.
[7] Harbeck v. Toledo, 11 Ohio St. 219.
[8] The State v. Shreeve, 15 N. J. L. 57; Hoagland v. Culvert, 20 N. J. L. 387.

were served according to law, or were waived by the parties.[1] The record or report of commissioners or viewers should contain the returns of service of notices.[2] It is not sufficient to allege service, but there should be a return showing on whom notices were served, and how. The service of notice is necessary in order to obtain jurisdiction, and proceedings will be quashed when it is not thus shown that jurisdiction has attached.[3] It would make no difference that one of the commissioners had personal knowledge that the notices were properly given. Such oral statements do not preclude the right of third persons to have proceedings regular.[4] If the statute does not require notices to be preserved, it is sufficient for commissioners to recite that notices were given, and not how they were given.[5] If the statute does not require a return of the service of notices, any other proof of service is admissible.[6] In Nebraska, it is required that proof of posting the notices should be made by affidavits of the party posting the same, stating when, where, and by whom the notices were posted.[7]

§ 102. **New notice of new proceedings.** — Proceedings which have been vacated or abandoned, for any reason, cannot be revived without new notice, — as, where notice had been given and a hearing had been had, but before formal verdict one of the jurymen died. In such case there should be a new notice of any subsequent proceedings; and if the

[1] Mobley v. Breed, 48 Ga. 44; Dupont v. Highway Commissioners, 28 Mich. 362.

[2] Lancaster v. Pope, 1 Mass. 86; Van Wickle v. Camden R. R., 14 N. J. L. 162; Skinner v. Lake View Avenue Co., 57 Ill. 151; Jones v. Barclay, 2 J. J. Marsh. 73; Purdy v. Martin, 31 Mich. 455; The People v. Commissioners of Nankin, 14 Mich. 523.

[3] The People v. Commissioners of Nankin, 14 Mich. 528; Dupont v. Highway Commissioners, 28 Mich. 362; Van Auken v. Commissioners, 27 Mich. 414; The State v. Otoe County, 6 Neb. 129; Doody v. Vaughn, 7 Neb. 28.

[4] Dupont v. Highway Commissioners, 28 Mich. 362.

[5] Shinkle v. Magill, 58 Ill. 422; Kissinger v. Hanselman, 33 Ind. 80; Commissioners' Court v. Bowie, 34 Ala. 461; Wright v. Wells, 29 Ind. 354.

[6] Parish v. Gilmanton, 11 N. H. 293.

[7] The State v. Otoe County, 6 Neb. 129; Doody v. Vaughn, 7 Neb. 28.

court, without such notice, admits new jurors, who hear additional testimony, the proceedings will be utterly void.[1] In case of a rehearing or a reassessment, there should also be additional notice.[2]

§ 103. **Notice to known owners.** — Notice must ordinarily be given to owners of every interest in the land, or the condemnation will, as to those omitted, be invalid.[3] The notices should be given to the owners specifically. The person occupying the land may be known by going on the land and making inquiry. The owners may be found by going to the records and tracing the title. If the last record owner is dead, his heirs may be properly described as unknown, but notices may not be given to all owners by publication, when the owners and occupiers may be known.[4] Those who are so injuriously affected by a proposed improvement as to entitle them to damages are also entitled to notice.[5] Notice should be given to heirs and widow, when known.[6] Notice to tenants in common should be given to both, in order to affect the interests of both, although the parties are husband and wife.[7] Notice either to the mortgageor or mortgagee is sufficient, especially if the mortgagee is in possession.[8] The mortgagee in possession should certainly receive notice.[9] It has sometimes been doubted whether the mortgagee, not in possession, is entitled to notice.[10] The better doctrine is that of a recent

[1] Anderson *v.* St. Louis, 47 Mo. 479.
[2] The People *v.* Tallman, 36 Barb. 222.
[3] The State *v.* Reed, 38 N. H. 59.
[4] Chicago R. R. *v.* Smith, 78 Ill. 96; Sharp *v.* Johnson, 4 Hill, 92.
[5] Norton *v.* Wallkill Valley R. R., 63 Barb. 77.
[6] New Orleans R. R. *v.* Frederic, 46 Miss. 1.
[7] Whitcher *v.* Benton, 48 N. H. 157.
[8] Cool *v.* Crommet, 13 Me. 250. The mortgagee should receive notice, or he may afterward foreclose his mortgage on the land taken. Warwick Institute *v.* City of Providence, Sup. Ct. R. I. (not yet reported).
[9] Parker, petitioner, 36 N. H. 84.
[10] Parish *v.* Gilmanton, 11 N. H. 298. See *ante*, § 74.

case in Maine,[1] where it is stated that a mortgagee whose mortgage is recorded is entitled to notice, although not in possession. The condemning party must see that the mortgagee is somehow paid or satisfied for the land taken, so far as covered by the mortgage. Without notice, a mortgagee might lose his entire security, by proceedings carried on without his knowledge or consent.

§ 104. **Notice to unknown owners.** — When the owners of property are unknown, the service must be on the apparent owners, and, in addition, advertising or posting to notify unknown owners.[2] Notice should be given to parties appearing by the records to be owners of lands. Owners by unrecorded conveyances, or by contracts for title, or by subsequent purchase, cannot complain of want of notice.[3] Deeds should be recorded and contracts perfected. There should be evidence of ordinary diligence in endeavoring to ascertain ownership, before proceedings as against unknown owners will be allowed; and the court may refuse to proceed until such diligence is shown.[4]

[1] Wilson *v.* European R. R., 66 Me. 358.
[2] Healey *v.* Newton, 119 Mass. 480.
[3] Wilson *v.* Hathaway, 42 Iowa, 173; Pickford *v.* Lynn, 98 Mass. 491.
[4] Harbeck *v.* Toledo, 11 Ohio St. 219.

CHAPTER XII.

OF THE NECESSITY OF EFFORTS TO AGREE ON COMPENSATION, AND OF CONTRACTS BETWEEN THE PARTIES.

§ 105. Property should be purchased.
106. Tender of amount of damages.
107. The effort to agree should appear affirmatively on the record.
108. Election not to agree — Inability to agree.
109. Waiver of agreement.
110. Contracts for rights of way.
111. Relinquishment of damages — Licenses to owners — Licenses granted by owner.
112. Reservations to owner — Easements not to be granted in lieu of damages, against the will of owner.
113. How contracts are to be enforced — Damages for breaches of contract.
114. Construction of contracts.

§ 105. **Property should be purchased.** — There is a reluctance on the part of the courts to the exercise of eminent domain, when the same end may be accomplished by agreement of the parties. The remedy is harsh in its nature, liable to gross perversion, and one which, in practice as in theory, encroaches upon the rights of the individual. In this country, as in England, it has always been the object of suspicion and distrust. When, therefore, the action of the government in taking private property can be attributed to a contract, instead of an exercise of eminent domain, it will be so treated.[1] The legislatures generally show the same spirit in requiring an agreement to be made with the owner, if possible, and that condemnation shall not be resorted to if an agreement can be made.[2] The owner,

[1] Bogert *v.* United States, 2 Ct. of Cl. 159.

[2] Oregon R. R. *v.* Oregon Nav. Co., 8 Oreg. 178; Gilmer *v.* Lime Point, 19 Cal. 47.

also, when he initiates proceedings, may properly be called upon to show an effort to agree, and to name some sum which he will take for his damages.[1] Provisions of this nature have been considered optional with either party in Tennessee[2] and Illinois.[3]

§ 106. **Tender of amount of damages.** — An agreement to sell, and a tender of the amount by the condemning party, do not operate as a transfer of the property so as to justify an entry. If the owner refuses to sell, there is a remedy at law for breach of contract, or in equity by specific performance, but an entry cannot be justified.[4] In Maine, there is a statute providing for the ascertainment of an amount considered reasonable, and for the tender of the same. It provides for the appraisement of the land and a tender of the damages. A tender made after an entry would be no justification for an action of trespass for the entry.[5] The English Lands Clauses Consolidation Act provides that the company shall make an offer of a certain sum as compensation, and if the owner refuses to accept the amount, and the same or a less sum is awarded to him, the costs will fall upon him. Having made the offer, the claimant will not even be entitled to the costs of a *mandamus* proceeding to compel the company to summon a jury, when the verdict of the jury is shown to be for a less sum than the offer.[6]

§ 107. **The effort to agree should appear affirmatively on the record.** — The record of the preliminary proceedings should affirmatively show a failure to agree.[7] The refusal of

[1] Lincoln *v.* Colusa County, 28 Cal. 662.
[2] Bigelow *v.* Mississippi R. R., 2 Head, 624.
[3] Hall *v.* The People, 57 Ill. 307.
[4] Whitman *v.* Boston R. R., 3 Allen, 133.
[5] Storer *v.* Hobbs, 52 Me. 144.
[6] Regina *v.* Waterford Rail. Co., 18 I. L. R. 272.
[7] Miller *v.* Brown, 56 N. Y. 388; Vail *v.* Morris R. R., 21 N. J. L. 189;

the owner is a jurisdictional fact, and is not to be eked out by extraneous evidence.[1] The allegation in the record makes a *primâ facie* case.[2] There should properly be an allegation of the attempt to agree in the petition or complaint.[3] An allegation in the words of the statute, that the parties could not agree upon the proper compensation, is a sufficient allegation to put the adverse party to his defence on the merits.[4] A statement in the petition, that the condemning party could not obtain permission of the owner of a quarry to take materials from the quarry, although such taking would do very little or no injury to the owner's property, is not a sufficient compliance with a statute authorizing a seizure of materials "when no private bargain could be made on fair terms." Such a petition does not show that any compensation was ever offered. The owner might have made a bargain if a fair remuneration had been offered him. Asking permission to use materials could not be considered as an attempt to make a bargain, without any offer of compensation.[5] If the allegation of failure to agree is made in the petition, the owner cannot except, on appeal, on the ground that there was no effort to purchase, not having raised the point below.[6] The burden of proving the failure to agree devolves upon the party claiming title under the

O'Hara *v.* Pennsylvania R. R., 25 Pa. 445; Cunningham *v.* Pacific R. R., 61 Mo. 33; Gilbert *v.* Turnpike Co., 3 Johns. Cas. 107; Reitenbaugh *v.* Chester R. R., 21 Pa. 100; Morseman *v.* Ionia, 32 Mich. 283; Arnold *v.* Decatur, 29 Mich. 77.

[1] Ells *v.* Pacific R. R., 51 Mo. 200; Jamison *v.* Springfield, 53 Mo. 224; Kansas City R. R. *v.* Campbell, 62 Mo. 585; Rogers *v.* St. Charles, 3 Mo. App. 41.

[2] Dyckman *v.* Mayor of New York, 5 N. Y. 434.

[3] Lincoln *v.* Colusa County, 28 Cal. 662. Petition alleged that the company "has not been able to acquire the title to said several tracts, etc., from the persons interested therein, by voluntary grant or otherwise." The petition does aver that the title to the land could not be obtained by purchase, and is sufficient in that respect. Chicago R. R. *v.* Chamberlain, 84 Ill. 333.

[4] Hannibal R. R. *v.* Muder, 49 Mo. 165.

[5] Lind *v.* Clemens, 44 Mo. 540.

[6] United States *v.* Reed, 56 Mo. 565; Dyckman *v.* Mayor of New York, 5 N. Y. 434.

exercise of eminent domain.[1] The evident intent of the legislature was that the owner should have the right and opportunity to dispose of his property for a just and fair compensation before proceedings should be instituted to deprive him of it against his will,[2] and also that the public may know the amount at which the owner will settle for his damages.[3] The reasons for the inability of the parties to agree must be stated in the petition, and if the reasons be not stated, the court acquires no jurisdiction and the proceedings fail.[4]

§ 108. **Election not to agree — Inability to agree.** — If the owner names an exorbitant sum, or refuses to give any terms, it is proper to hold that the parties are unable to agree.[5] The requirement that an agreement should be made is for the benefit of the owner. If he signifies that he will not or cannot agree, by demanding a jury for the assessment of damages, no further evidence of effort to agree is necessary, and no actual effort need be proved.[6] If parties holding the title are unable to sell, on account of disability, their disability would operate as a refusal to agree on price.[7] The inability of parties to agree is the fact required. No formal negotiation is necessary is such cases. A tender and refusal is sufficient.[8] An infant cannot convey land, and hence cannot agree on price, and in such case there need not be an effort to agree.[9] Agreement might be

[1] Dyckman v. Mayor of New York, 5 N. Y. 434.
[2] Leslie v. St. Louis, 47 Mo. 474.
[3] Lincoln v. Colusa County, 28 Cal. 662.
[4] Matter of Marsh, 71 N. Y. 315.
[5] Todd v. Austin, 34 Conn. 78; Trinity College v. Hartford, 32 Conn. 452. By inability to agree on the price of land the law does not mean that it must be impossible to purchase the right at any price, however large. It means that the owner must be either unwilling to sell at all, or willing to sell only at a price so large as, in the good judgment of the agents of the corporation, to be considered excessive. Matter of Prospect Park R. R., 67 N. Y. 371.
[6] Burt v. Brigham, 117 Mass. 307.
[7] Balch v. Commissioners of Essex, 103 Mass. 106.
[8] Williams v. Hartford R. R., 13 Conn. 397.
[9] Indiana R. R. v. Oakes, 20 Ind. 9.

difficult or impossible with non-residents, and in their case it would be sufficient to show that offers had been made to agents of the non-residents.[1] An affidavit that parties had failed to agree implies an effort to agree.[2]

§ 109. **Waiver of agreement.** — A mere appearance before a jury does not operate to waive the right of notice to agree and effort of agreement.[3] An appeal on the question of damages is a waiver of the agreement, and estops the owner from setting up that no effort to agree was made. The exception must be taken below. The appeal is presumed to be made from an assessment, which assessment could only be made on a failure to agree. Such an error as a failure to agree can be corrected on *certiorari*[4] or appeal,[5] but cannot be inquired into in a collateral proceeding.[6] An approval, by the court, of a bond for appeal is an adjudication that all such preliminaries have been properly conducted to entitle the party to file a bond.[7]

§ 110. **Contracts for rights of way.** — All contracts made by the condemning party with the owner, whereby the privileges desired are wholly or in part obtained without condemnation, are favorably regarded by the courts, and are construed strongly in favor of the owner.[8] Contracts for rights of way and payment of compensation need not be in writing, to satisfy the statute of frauds.[9] Such contracts are to be construed so as to put the burden on the condemning party of making good the grounds on which it sought to divest the owner of his rights; and he may show that he was unlettered, and that he did not know

[1] West Virginia Transp. Co. *v.* Oil Co., 5 W. Va. 382.
[2] Tucker *v.* Erie R. R., 27 Pa. 281.
[3] Hinckley, petitioner, 15 Pick. 447.
[4] Mississippi R. R. *v.* Rosseau, 8 Iowa, 373.
[5] Ney *v.* Swinney, 86 Ind. 454.
[6] Mississippi R. R. *v.* Rosseau, 8 Iowa, 373.
[7] Wadhams *v.* Lackawanna R. R., 42 Pa. 303.
[8] Tyler *v.* St. Louis, 56 Mo. 60.
[9] Noyes *v.* Chapin, 6 Wend. 461.

the character of the instrument he was signing.[1] The title acquired by contract is ordinarily the same as that acquired by condemnation,[2] although a fee may be obtained by deed when the company would not be authorized to condemn a fee.[3] Land thus obtained does not revert on a discontinuance of the improvement.[4] As condemnation proceedings are presumed to consider and include all damages suffered, so deeds of rights of way are presumed to include all damages arising from proper construction of the improvement. The price agreed upon in the deed is supposed to be the same that the commissioners would have arrived at on an assessment,[5] and to include such damages as result from laying of drains and deepening the bed of a stream, if reasonably required.[6] The evidence as to the extent of the condemnation and of the rights reserved is found in the description filed; and if the description does not contain the reservations, they cannot be proved on the trial to assess damages. The party condemning cannot show, in reduction of damages, that fences had been put up at its expense for the benefit of the owner, and that gaps and ways were offered to be put in.[7] The rights must be preserved to the owner by a proper description, and, if thus secured to him, may be shown in reduction of damages. To show this, a deed may be offered in evidence to show rights or easements reserved to the owner, — such as the right to make a crossing.[8]

§ 111. **Relinquishment of damages — Licenses to owner — Licenses granted by owner.** — A relinquishment of damages may be by parol. It is not in the nature of a con-

[1] Rockford R. R. *v.* Schunick, 65 Ill. 223.
[2] Troy R. R. *v.* Potter, 42 Vt. 265.
[3] Page *v.* Heineberg, 40 Vt. 81.
[4] *Ibid.*
[5] Norris *v.* Vermont Central R. R., 28 Vt. 99; Matter of Utica R. R., 56 Barb. 456.
[6] Babcock *v.* Western R. R., 9 Metc. 553.
[7] Ham *v.* Salem, 100 Mass. 350.
[8] Boston R. R. *v.* Middlesex, 1 Allen, 324.

veyance of land, so as to require a written instrument to satisfy the statute of frauds. It is rather a license, and if acted upon by the public, or the party condemning, is and must be construed to be a waiver of damages.[1] A consent in writing cannot be revoked.[2] If the owner has agreed not to claim damages, while the commissioners are determining whether or not the road shall be laid out, the waiver is binding, and may be proven before the jury assessing damages. The question before the jury is as to whether the owner is entitled to any damages, and, if so, how much.[3] That an owner has petitioned for the improvement does not bar his claim for damages.[4] The assent of the owner may be proved by long acceptance, as well as by parol.[5] A release of a portion of the damages does not take away the right of the owner to have the rest of his damages assessed by a jury, and by proceedings in regular form.[6] A relinquishment of land does not operate as a relinquishment of damages for removing buildings, and rendering the remainder of the land suitable for occupation.[7] Licenses to enter without damages must be acted on before revocation by the owner.[8] After entry they cannot be revoked. Officers acting under a license, without being informed that such license was revoked, would not be liable personally, if acting in good faith.[9] A mere consent to enter does not

[1] Clement *v.* Durgin, 5 Me. 9; Fuller *v.* Plymouth, 15 Pick. 81; Marble *v.* Whitney, 28 N. Y. 297; The People *v.* Goodwin, 5 N. Y. 568; Noyes *v.* Chapin, 6 Wend. 461. Consent given by a city to the use of a street by a railroad cannot be withdrawn by repealing the ordinance granting consent, if prior to that time the railroad had made expenditures on the strength of such consent. Rio Grande R. R. *v.* Brownsville, 45 Texas, 88.

[2] Squiers *v.* Neenah, 24 Wis. 588.

[3] White *v.* Norfolk, 2 Cush. 361.

[4] Barker *v.* Taunton, 119 Mass. 392; Newville Road, 8 Watts, 172.

[5] Cottrill *v.* Myrick, 12 Me. 222.

[6] Sturtevant *v.* Plymouth, 12 Mete. 7.

[7] Foster *v.* Boston, 22 Pick. 33.

[8] The People *v.* Goodwin, 5 N. Y. 568; Macon R. R. *v.* Bowen, 45 Ga. 581; New Orleans R. R. *v.* Moye, 39 Miss. 374; Hetfield *v.* Central R. R., 29 N. J. L. 571; East Pennsylvania R. R. *v.* Heister, 40 Pa. 53; Murdock *v.* Prospect Park R. R., 17 N. Y. Sup. Ct. 598.

[9] Squiers *v.* Neenah, 24 Wis. 588.

waive damages, but waives the prior payment.[1] Licenses granted to the owner by the condemning party may also be revoked.[2]

§ 112. **Reservations to owner — Easements not to be granted in lieu of damages, against the will of owner.** — Compensation is ordinarily to be made in money, yet reservations of rights to owners are favored, and the condemning party may ratify an award a part of which requires certain improvements to be made for the benefit of the owner.[3] The reservation of rights to the owner is only carrying out the spirit of the law, that the public improvement shall be made with the least damage to private individuals.[4] These conditions and reservations cannot be fixed against the will of the parties. The owners are not compelled to accept, or the condemning party to grant, the easements.[5] Hence it is irregular to fix the compensation at a certain sum, with a wagon-way, etc., unless such easement is accepted.[6] When agreed upon and accepted, such reservations may be shown in reduction of damages, — as, that commissioners had ordered a drain, which would obviate the principal damages.[7] The fact that reservations have been made to the owner and accepted by him does not operate as a waiver of his claim for damages.[8]

§ 113. **How contracts are to be enforced — Damages for breaches of contract.** — The reservations to the owner constitute a part of the compensation. If the party con-

[1] Smith *v.* Ferris, 13 N. Y. Sup. Ct. 553.
[2] Haldeman *v.* Pennsylvania R. R., 50 Pa. 425.
[3] Morse, petitioner, 18 Pick. 443.
[4] Windsor *v.* Field, 1 Conn. 279.
[5] Hill *v.* Mohawk R. R., 7 N. Y. 152; *s. c.*, 5 Denio. 206; Riker *v.* Mayor, 8 Daly, 174; Railroad Co. *v.* Halstead, 7 W. Va. 301; Chesapeake R. R. *v.* Patton, 6 W. Va. 147; Chicago R. R. *v.* Melville, 66 Ill. 329.
[6] Central R. R. *v.* Holler, 7 Ohio St. 220.
[7] Chapin *v.* Boston R. R., 6 Cush. 422.
[8] Brown *v.* Worcester, 13 Gray, 31.

demning fails to fulfil the conditions of the contract, there will be an action for damages[1] on the contract, or for specific performance of the contract.[2] There should not be a proceeding to assess damages anew.[3] The damages for breaches of contract must be obtained in a separate action from that in which compensation is adjusted.[4] The party condemning cannot escape the conditions of its contracts by afterward condemning.[5] The corporation may condemn, but the rights obtained by contract must still be preserved to the owners. The rights secured by contracts are not to be offered in mitigation of damages.[6] If there is a failure to fulfil conditions, the owner may treat the contract as broken, and claim the land, and may refuse to give up the same if entry has not been made;[7] or he may enjoin an entry until the compensation for the entire injury is fully made.[8] If the condemning party is in possession, and has gone to great expense in making improvements, it has been doubted whether an injunction will lie.[9] An action on the case will be sustained for damages,[10] and ejectment has also been sustained.[11] The action of ejectment will not be sustained where the entry was by virtue of a contract which the condemning party subsequently failed to observe. The license or contract of the owner cannot be revoked or

[1] Morss *v.* Boston R. R., 2 Cush. 536.

[2] Viele *v.* Troy R. R., 20 N. Y. 184; Eastern Counties Rail. Co. *v.* Hawkes, 24 L. J. (Ch.) 601. Possible inconvenience to the public is no ground for refusing specific performance. Raphael *v.* Thames Valley Rail. Co., 36 L. J. (Ch.) 209; L. R. 2 Ch. App. 147.

[3] White *v.* Boston R. R., 6 Cush. 420; Kansas Pacific R. R. *v.* Hopkins, 18 Kan. 494.

[4] Sherwood *v.* St. Paul R. R., 21 Minn. 122; Western Pacific R. R. *v.* Reed, 35 Cal. 621; Bechnel *v.* New Orleans R. R., 28 La. An. 522.

[5] Gray *v.* Burlington R. R., 37 Iowa, 119.

[6] Schermeely *v.* Stillwater R. R., 16 Minn. 506.

[7] Taylor *v.* Cedar Rapids R. R., 25 Iowa, 371

[8] Unangst's Appeal, 55 Pa. 128.

[9] Pusey *v.* Wright, 31 Pa. 387.

[10] St. Louis R. R. *v.* Mitchell, 47 Ill. 165.

[11] Cases cited in Baker *v.* Chicago R. R., 57 Mo. 265. Denied, Hornback *v.* Cincinnati R. R., 20 Ohio St. 81.

annulled by him after entry is made and improvements entered upon. The license to enter, in such cases, becomes coupled with an interest. The owner should make the conditions, in his contract, conditions precedent to entry, and not subsequent. After entry and occupation, the remedy is by specific performance or in damages, and not in ejectment.[1] The owner may be compelled to a specific performance of his contract, and after the company has incurred expense he may be enjoined from pursuing an action of ejectment.[2] A specific performance may be decreed in favor of the owner, although the owner was not at first able to give an unencumbered title, which was afterward done.[3] A reservation imposed in the verdict in the trial below is not binding, unless the same condition is imposed by the jury on appeal.[4] An agreement for damages at a certain sum is a contract which may be enforced, and the board of supervisors may be compelled to allow the demand by *mandamus*.[5] The covenants or contracts to erect improvements do not run with the land, and cannot be sued upon by the grantee of the original owner.[6]

§ 114. **Construction of contracts.** — The courts incline to construe contracts in favor of the owners, and do not extend their meaning by construction. A permission to build in one place does not operate as a permission to build elsewhere.[7] But the owner may be estopped from pursuing the company as a trespasser by allowing the company to

[1] Baltimore R. R. *v.* Highland, 48 Ind. 381; Hornback *v.* Railroad, 20 Ohio St. 81; Baker *v.* Chicago R. R., 57 Mo. 265.

[2] Chesapeake Canal *v.* Young, 3 Md. 480; Ross *v.* Chicago R. R., 77 Ill. 127. The owner may also be enjoined from resorting to compulsory proceedings. Duke of Norfolk *v.* Tennant, 9 Hare, 745; 16 Jur. 398.

[3] Viele *v.* Troy R. R., 20 N. Y. 184.

[4] Morss *v.* Boston R. R., 2 Cush. 536.

[5] The People *v.* Supervisors of Richmond County, 20 N. Y. 252.

[6] Piper *v.* Union Pacific R. R., 14 Kan. 568.

[7] Hall *v.* Pickering, 40 Me. 548; Hosher *v.* Kansas City R. R., 60 Mo. 329; Lewis *v.* Smith, 1 A. K. Marsh. 159.

build in another place. The original agreement as to compensation in one place would have no bearing on the claim for damages in the place taken.[1] A consent to a change of survey does not operate as a waiver of damages.[2]

[1] Hosher v. Kansas City R. R., 60 Mo. 329.
[2] Kent v. Wallingford, 42 Vt. 651.

CHAPTER XIII.

DESCRIPTION OF PROPERTY TO BE TAKEN.

§ 115. Certainty of description required.
116. Filing survey.
117. Maps.
118. Map need not show whole road, or entire tracts of land.
119. Quality of land — Improvements.
120. Exemption of dwelling-houses from condemnation — Dwelling-house defined.
121. Exemption of gardens, yards, orchards, and manufactories from condemnation.
122. Variation of location and occupation.
123. Necessary materials.

§ 115. **Certainty of description required.** — Statutes vary greatly as to requirements of maps, plats, and surveys, and of the descriptions deemed necessary in petitions. Plans must be intelligible, and give angles, distances, etc., sufficient so as not to require parol testimony to explain the plan and scale of distances.[1] The report of commissioners should contain such a description that the property taken and valued may be ascertained from the record,[2] or a *certiorari* will be granted.[3] The certainty is of the same nature as the certainty required in conveyances of land,[4] so that a

[1] Portland R. R. *v.* Commissioners of York County, 65 Me. 292; Vail *v.* Morris R. R., 21 N. J. L. 189.

[2] Pennsylvania R. R. *v.* Porter, 29 Pa. 165; Todemier *v.* Aspinwall, 43 Ill. 401.

[3] Lewiston *v.* Commissioners, 30 Me. 19.

[4] Rice *v.* Turnpike Co., 7 Dana, 81. A Massachusetts statute required the filing in the office of the registry of deeds for the county in which the lands are situated a description of the land so taken, "as certain as is required in a common conveyance of land." The description may refer to a plan, or to the fact that the plan referred to was recorded. The question is of identity, which it is competent to prove by evidence. That is a question of fact. As to the

surveyor could go on the land and mark out the land designated.[1] The taking of the land is in the nature of a conveyance from the owner, and he is entitled to know how much land is taken from him, and the exact boundaries of what remains. The actual contents of the tract taken need not be shown or set forth, if that is a matter of calculation from the length, breadth, and courses given.[2] The location should state the width and boundaries of the location; if not, the location will be invalid.[3] A statute requiring a description in a petition is satisfied by having a description in a schedule attached to the petition.[4] A petition for a county road is sufficiently certain if it sets forth the *termini*, and the general course between them.[5] The certainty should be such as to prevent surprise, or such as would not mislead. If the strip has been staked off, and the description filed shows the strip and its width, direction, and other sections over which it runs, and a profile and plat has been filed, sufficient certainty is obtained.[6] It is not sufficiently definite to place one *terminus* at a point on the Ohio and Pennsylvania state line in the county of Trumbull, and the other at a point on the Ohio River, in either the county of Brown or Adams.[7] A statute authorizing the construction of a railroad "to Brownsville" does not require the ter-

certainty of the description, the question is, Can one familiar with the land and the monuments upon and about it, by the courses, distances, monuments, and other means of identification therein given, apply the description, as filed in the registry, to the land, with such reasonable certainty as to show the limits of the taking? If so, this is all which the statute demands, and this is a question of evidence, and not of law. Kohlhepp *v.* West Roxbury, 120 Mass. 596.

[1] Macon *v.* Owen, 8 Ala. 116.

[2] Pennsylvania R. R. *v.* Bruner, 55 Pa. 318.

[3] Housatonic R. R. *v.* Lee R. R., 118 Mass. 391; Vail *v.* Morris R. R., 21 N. J. L. 189.

[4] Washington Park Commissioners, 52 N. Y. 131.

[5] Sumner *v.* Commissioners, 37 Me. 112.

[6] Quincy R. R. *v.* Kellogg, 54 Mo. 334. The court will take judicial cognizance of certain monuments. Kile *v.* Yellowhead, 80 Ill. 208. See also § 278, *post*.

[7] Atlantic R. R. *v.* Sullivant, 5 Ohio St. 276.

mination of the road at the boundary of the city, but the *terminus* may be anywhere in the city.[1] Under a statute requiring a precise description of the land taken, it is insufficient description to describe as follows: "Said embankment extending diagonally through said tract of land, from a point near the north-east corner to a point near the south-west corner." *Near* is an indefinite word at all times, and as used in this description, without any other qualifying word, it is impossible to locate therefrom, with any degree of precision, the beginning of the embankment. It might be on either side of the corner. Further, the width is not given. A precise description is a definite, accurate, and correct description. The description given is inaccurate, incorrect, and unprecise.[2] "At or near the residence" of a person is too indefinite a description of a *terminus* to authorize a location of a highway.[3] The description of a course as "passing over and upon the line dividing the lands of certain owners" is sufficient.[4]

§ 116. **Filing survey.** — It is reasonable that a private corporation condemning property shall inform owners of the exact property proposed to be taken, and hence it is frequently provided that a survey of the route shall be filed in some public office to which all persons may have access. Unless this is done, the action of the corporation in entering will be unwarranted, and subject its officers to an action of trespass.[5] The survey filed constitutes the written, permanent record evidence of the exact land taken. It is con-

[1] Rio Grande R. R. *v.* Brownsville, 45 Texas, 88. Road from "Troy to city of Hudson," need not stop on arriving at the boundary of Hudson. Farmers' Turnpike Co., 10 Johns. 388. "At or near the city of Schenectady" means at or within the city. Mohawk Bridge *v.* Utica R. R., 6 Paige, 554.

[2] Indianapolis R. R. *v.* Newsom, 54 Ind. 121.

[3] De Long *v.* Schimmel, 58 Ind. 64.

[4] Hedrick *v.* Hedrick, 55 Ind. 78.

[5] Bonaparte *v.* Camden R. R., Baldw. 205; Wilson *v.* Lynn, 119 Mass. 174; Wamesit Power Co. *v.* Allen, 120 Mass. 358; Lund *v.* New Bedford, 121 Mass. 286.

clusive, both on the condemning party and the owner.[1] The filing of a survey being a necessary preliminary to condemnation, the owner cannot, in the absence of such survey, and without actual occupation by the condemning party, sue for the recovery of the value of the land.[2]

§ 117. **Maps.** — Maps should be plain enough to be understood by a plain, ordinary man.[3] A map means, not only a delineation giving a general idea of the land taken, but also such full and accurate notes and *data* as are necessary to furnish complete means for identifying and ascertaining the precise position of every part, with courses and distances, so that every part can be found.[4] In condemnation of land already in the occupation of the condemning party, the requirements as to maps need not be so strictly complied with. The requirement is to apprise the owner of the particular land to be taken. After it is taken and occupied, the owner knows from the occupation.[5] Surveyor's maps need not be signed by the surveyor.[6] A map which is slightly defective, but which may be corrected by the written return, and the courses and distances given, will not for that cause be set aside.[7]

§ 118. **Map need not show whole road, or entire tracts of land.** — It is not necessary that an entire map of the whole road be filed. It is sufficient that the map be complete through and beyond the owner's land, so as to show what is to be taken from him.[8] The parts which are to be condemned are the parts necessary to be shown.[9] The

[1] Hazen *v.* Boston R. R., 2 Gray, 574.
[2] Teick *v.* Commissioners, 11 Minn. 292.
[3] New York & Boston R. R., 62 Barb. 85.
[4] Convers *v.* Grand Rapids R. R., 18 Mich. 459.
[5] Strang *v.* Beloit R. R., 16 Wis. 635.
[6] Tower *v.* Pitstick, 55 Ill. 115.
[7] The State *v.* Miller, 23 N. J. L. 383.
[8] Somerville R. R. *v.* Doughty, 21 N. J. L. 442; Hunt *v.* Smith, 9 Kan. 137.
[9] Hunt *v.* Smith, 9 Kan. 137.

entire tracts of land through which the road passes need not be given, but only the part taken and the lines and fences crossed.[1]

§ 119. **Quality of land — Improvements.** — Land may be described in quality as barren or fertile, town land or farm land, woodland or cultivated, hillside or bottom, and the character should be set forth.[2] In describing town land taken, it is not necessary to show, under the head of quality, that it was arable, meadow, or otherwise. It is sufficient to say that it was used as a lumber-yard.[3] Maps should show the improvements on the land taken, or through which the road passes.[4]

§ 120. **Exemption of dwelling-houses from condemnation — Dwelling-house defined.** — A dwelling-house is, of itself, no more exempt from condemnation for public uses than any other property. The legislature may properly provide that public improvements shall not take any dwelling-house or other building.[5] A dwelling-house would not include a garden, orchard, or curtilage.[6] A billiard-saloon attached to a hotel is within the exemption.[7] The exemption is not violated by passing near a dwelling-house, but on land of another. One proprietor could not have control over the property of his neighbor, and prevent his giving his consent or having a railroad on his land, if he so desired, although the railroad was in fact within the prohibited limits from the house of complainant.[8] The statute cannot be evaded by erecting a shanty in the line of the

[1] The State *v.* Hopping, 18 N. J. L. 423.

[2] O'Hara *v.* Pennsylvania R. R., 25 Pa. 445; Zack *v.* Pennsylvania R. R., 25 Pa. 394.

[3] Pennsylvania R. R. *v.* Bruner, 55 Pa. 818.

[4] The State *v.* Hopping, 18 N. J. L. 423; Potts's Appeal, 15 Pa. 414.

[5] The State *v.* Troth, 34 N. J. L. 377; Wells *v.* Somerset R. R., 47 Me. 345.

[6] Wells *v.* Somerset R. R., 47 Me. 345.

[7] The State *v.* Troth, 36 N. J. L. 377.

[8] Richmond R. R. *v.* Wicker, 13 Gratt. 375.

proposed improvement, and inducing negroes to live in the house. The house must be a *bonâ fide* dwelling-house, and not erected or occupied for the purpose of defeating a condemnation.[1] The word "house" has been held to include not only a court-yard, but also office, houses, and garden, and all that is necessary to the enjoyment of the house, if within the same ambit or circuit, whether attached to the main building or not, and though purchased subsequently to the erection of the main building.[2] Gardens attached to houses, and out-houses used in connection with houses, are included under the term "houses."[3] Unfinished houses, and property bought for the purpose of making necessary additions, are within the protection.[4] The rule is to be construed liberally in favor of the owner of the property.[5] The test to be applied in doubtful cases is whether the field, or portion required, would pass in a conveyance of the house, as part of the appurtenances. If it would pass under the word "house," then it is within the protection of the act, and in England the owner could require the company to take the whole of the premises.[6] The appurtenances must be necessary for the convenient use and occupation of the house, and not devoted merely to out-door amusements.[7]

§ 121. **Exemption of gardens, yards, orchards, and manufactories from condemnation.** — Some statutes extend the

[1] Morris *v.* Schallsville Branch Road, 4 Bush, 448; Carris *v.* Commissioners of Waterloo, 2 Hill, 443.

[2] Governors of St. Thomas Hospital *v.* Charing Cross Rail. Co., 30 L. J. (Ch.) 395; Marson *v.* London Rail. Co., 37 L. J. (Ch.) 483.

[3] Dakin *v.* London & North-Western Rail. Co., 26 L. J. (Ch.) 784; King *v.* Wycombe Rail. Co., 29 L. J. (Ch.) 462; Cole *v.* West London & Crystal Palace Co., 27 Beav. 242.

[4] Alexander *v.* West End & Crystal Palace Co., 31 L. J. (Ch.) 500; Grosvenor *v.* Hampstead Junction Rail. Co., 26 L. J. (Ch.) 781.

[5] Reddin *v.* Metropolitan Board of Works, 31 L. J. (Ch.) 660.

[6] Ferguson *v.* London Rail. Co., 32 L. J. (Ch.) 29; Grosvenor *v.* Hampstead Junction Rail. Co., 1 De G. & J. 446; Smith *v.* Martin, 2 Wms. Saund. 394.

[7] Doe d. Clements *v.* Collins, 2 T. R. 498; Steele *v.* Midland Rail. Co., L. R. 1 Ch. App. 275; Pulling *v.* London, Chatham, etc., Rail. Co., 4 N. R. 45, 886; 33 L. J. (Ch.) 505.

immunity to gardens, yards, orchards, warehouses, and manufactories. A lumber-yard would not be within the protection of the statute.[1] A protection to a garden which had been cultivated for four years does not extend to an uncultivated portion of such garden. The garden must be actually cultivated.[2] A field is not an orchard, although there may be fruit-trees in some part of it.[3] Although the line of a survey runs into a tract used as an orchard, yet the laying-out would not be void unless the trees came within the survey, or the owner would be deprived of the use of them,[4] and then the road would be invalid only as to the points encroaching.[5] All the ground around a mill is not exempted, although such land might be used for storing logs, provided sufficient mill-yard is left, and on this question the decision of the commissioners cannot be reviewed.[6] It is doubtful whether the owner can claim the immunity after seeking damages and claiming an increase on appeal,[7] especially when the point that the road would encroach was not made in the first instance.[8] Officers laying out roads through yards or buildings exempt from condemnation will be liable in trespass.[9]

The term "manufactory" has been the subject of construction in the English courts. Land used by an iron and tin-plate manufactory as a place of deposit for rubbish, and the *scoriæ* which came from the furnace, would be included.[10] A workshop is a manufactory.[11] Ground used by a dust-contractor for assorting dust, with an assorting-

[1] Stone *v.* Commercial Rail. Co., 9 Sim. 621; Regina *v.* Sheriff, 3 Eng. Rail. Cas. 396.

[2] The People *v.* Commissioners of Highways, 57 N. Y. 549; Lansing *v.* Caswell, 4 Paige, 519.

[3] The People *v.* Judges Dutchess County, 23 Wend. 360.

[4] Snyder *v.* Trumpbour, 38 N. Y. 355; Snyder *v.* Plass, 28 N. Y. 465.

[5] Snyder *v.* Plass, 28 N. Y. 465.

[6] The People *v.* Kingman, 24 N. Y. 559.

[7] Lansing *v.* Caswell, 4 Paige, 519.

[8] Cummins *v.* Shields, 34 Ind. 154; Crossley *v.* O'Brien, 24 Ind. 325.

[9] Clapper, *ex parte*, 3 Hill, 458.

[10] Sparrow *v.* Oxford R. R., 2 De G. M. & G. 94.

[11] Giles *v.* London, Chatham & Dover R. R., 30 L. J. (Ch.) 603.

house, would not constitute a manufactory.[1] Warehouses used in connection with a manufactory would be included, although separated from the manufactory by a road.[2] The taking of a manufactory includes all the fixtures and machinery, although some of them were known as trade fixtures, which might have been removed by the lessee at the end of his term.[3]

§ 122. **Variation of location and occupation.** — The burden of proof is on the condemning party to show that the authorized location actually covers the land taken. The company cannot resort to extrinsic evidence to show that the land taken was intended to be taken, although not described in the location. The location as filed is conclusive, and any variation will constitute a trespass.[4] The company condemning cannot object that the description is not accurate, after they have located and occupied.[5] If there has been error, the only way to remedy is by filing a record of the changes in the proper office.[6] After the land has been entered upon and the road constructed, the road having been previously surveyed and staked out, the presumption is that the occupation and location are the same, especially where the stakes have been removed in constructing the road. Such a location could not be set aside for uncertainty when the location was rendered certain by the occupation.[7]

§ 123. **Necessary materials.** — Materials are not always convenient to a public improvement, and hence authority may be given to take necessary materials from adjoining

[1] Reddin *v.* Metropolitan Board of Works, 31 L. J. (Ch.) 660.

[2] Spackman *v.* Great Western Rail. Co., 1 Jur. (N. S.) 790.

[3] Gibson *v.* Hammersmith Rail. Co., 32 L. J. (Ch.) 337; *s. c.*, 2 Drew. & Sm. 603.

[4] Hazen *v.* Boston R. R., 2 Gray, 574; Matter of New York & Boston R. R., 62 Barb. 85.

[5] Callender *v.* Painesville R. R., 11 Ohio St. 516.

[6] Vail *v.* Morris R. R., 21 N. J. L. 189.

[7] Cleveland R. R. *v.* Prentice, 18 Ohio St. 373.

land. The word "necessary" does not mean absolutely indispensable, or that without the use of those particular materials the work could not possibly go on. The word means needful and conducive to the object, and more convenient in the appropriation than others that might be readily selected.[1] The materials need not all be taken from the land immediately adjacent, but may be taken where they may be easily procured. Timber need not be taken from groves in a town, when it can be taken outside more abundantly and cheaply.[2] An authority to take materials from one portion of a road, to be used on another portion of it, will not justify a taking of materials from land not taken.[3] Stone may be hewed on land not taken.[4] The commissioners for assessing the value of materials cannot be called until after it is ascertained what materials are to be taken.[5] The English Lands Clauses Consolidation Act contemplates the entry on land temporarily, for the purpose of taking earth or soil by side cuttings therefrom; for the purpose of depositing soil thereon; for the purpose of obtaining minerals therefrom; for the construction or repair of the railway, or such accommodation-works as aforesaid; for the purpose of forming roads thereon, to or from, or by the side of, the railway.[6]

[1] Jerome *v.* Ross, 7 Johns. Ch. 315.
[2] Bliss *v.* Hosmer, 15 Ohio, 44.
[3] Parsons *v.* Howe, 41 Me. 218.
[4] Vermont R. R. *v.* Baxter, 22 Vt. 365, Redfield, J.
[5] *Ibid.*
[6] 8 Vict., c. 20, § 32.

CHAPTER XIV.

OF THE TIME AND MANNER OF MAKING COMPENSATION.

§ 124. Early doctrine that compensation need not precede taking.
125. Public roads under proprietary governments — Roads on wild land.
126. Distinction between a taking by the state or a municipal subdivision and a taking by private corporations.
127. Prepayment of damages which cannot be estimated — Imperative necessity.
128. Statutes or charters failing to provide compensation do not authorize the exercise of eminent domain.
129. Preliminary occupation.
130. Payment a condition precedent to entry.
131. Judgment not compensation.
132. Right to sue not compensation.
133. Consideration of public welfare not compensation.
134. Consent of authorities cannot affect the payment of damages.
135. Compensation in money — Just compensation.
136. Bond to secure damages — Bond pending appeal.
137. Entry pending appeal.
138. Deposit pending an appeal.
139. Tender pending an appeal.
140. Waiver of prepayment by allowing entry to be made.
141. Continued assent to use.
142. Where original entry is lawful — Delay in perfecting title.
143. Acquiescence not a waiver of damages.
144. Lien on land for compensation — Change of corporations — Subsequent purchaser of franchise.
145. Refusal of officers to pay compensation assessed.
146. Payment to wrong claimant.
147. Refusal to take money — Failure to claim.
148. Ownership of improvements made during unlawful occupation.

§ 124. **Early doctrine that compensation need not precede taking.** — In the earlier days of our state governments, private property, when taken for public use, was taken mainly by the state or its municipal subdivisions, and

the compensation was paid by the state; and the laws passed provided for an immediate entry, and a payment from the public treasury. Such condemnations were considered, for every practical purpose, as cash sales, and were held to be valid by the courts, although the law authorized the taking before the actual payment; and in this manner and to this extent, at least, it became the doctrine of several of the state courts that the payment of the compensation need not precede or be simultaneous with the taking.[1] And in one case it was considered that an act authorizing condemnation might not be unconstitutional although no compensation was provided in it, because it would be presumed that the legislature would afterward provide a remedy.[2] In this case, Chancellor Kent considered that although the constitution imposed an absolute duty on the legislature to make provision for compensation whenever there was an interference with private right, yet he would not declare an act a nullity because no compensation was provided. It would be presumed that the legislature would, in a subsequent act, remedy the omission; and in some cases the exercise of the power might be restrained until compensation was provided. Judge Baldwin, in the later case of Bonaparte *v.* Camden Railroad,[3] held that such a law, if not void, would be inoperative to pass the right of property until just compensation was made. The courts would suspend the execution of the law until compensation was provided, or would allow the common-law remedies of trespass and ejectment to be enforced. The constitution would thus render the legislative act inoperative in so far as it assumed to take private property without compensation.[4] Many state constitutions declare positively that the payment of compensation, or se-

[1] Compton *v.* Susquehanna R. R., 3 Bland, 386.

[2] Rogers *v.* Bradshaw, 20 Johns. 735. See also Cairo R. R. *v.* Turner, 31 Ark. 494.

[3] Baldw. 205.

[4] See also Stevens *v.* Middlesex Canal, 12 Mass. 466; Ash *v.* Cummings, 50 N. H. 591; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, *per* McLean, J.

curity for its payment, shall precede the taking, or at least be concurrent with it.[1]

The New York doctrine is, that where certain and adequate means are provided for obtaining satisfaction for land taken by the power of eminent domain, compensation need not be paid in advance.[2] It is doubtful whether an assessment of benefits on adjoining unimproved lands constitutes a certain fund.[3]

The New Jersey doctrine is similar, with the addition that the remedy is such that the owner may seek his compensation on his own motion.[4] The owner, however, is not to be turned over to the generosity of the legislature.[5]

In North Carolina, compensation need not be first made,[6] but there may be an entry, and an adjustment afterward.[7]

In South Carolina, compensation is made subsequently, because it cannot be known in advance what the damages will be, and because assessments made prior must be made at a venture.[8]

In Alabama, it is provided that within six months after a road is completed the owner may have an assessment of damages, and direct payment out of the county treasury.[9]

In Arkansas, it is held that in the absence of a distinct provision in the constitution requiring payment of compensation to precede the taking of the property, it need not precede entry, provided there is an adequate remedy afforded before such entry is made, which may be provided in the charter or in existing laws.[10]

[1] Garrison v. New York, 21 Wall. 196.

[2] Rider v. Striker, 68 N. Y. 136; Bloodgood v. Mohawk R. R., 18 Wend. 9; The People v. Hayden, 6 Hill, 359; Smith v. Helmer, 7 Barb. 416.

[3] Rider v. Striker, 9 N. Y. Sup. Ct. 115.

[4] Loweree v. Newark, 38 N. J. L. 151.

[5] Sinnickson v. Johnson, 17 N. J. L. 129.

[6] Johnston v. Rankin, 70 N. C. 550.

[7] McIntire v. Western R. R., 67 N. C. 278.

[8] Raleigh R. R. v. Davis, 2 Dev. & B. 451.

[9] Commissioners' Court v. Bowie, 34 Ala. 461.

[10] Cairo R. R. v. Turner, 31 Ark. 494. In the same case it was held that a

§ 125. **Public roads under proprietary governments — Roads on wild land.** — Neither the proprietary governments nor the state governments which succeeded them made any compensation to the owners of land through which public roads were laid out, as a certain per cent of excess of land was allowed in all grants for that purpose.[1] This right did not include the taking of materials or the improvements on land without compensation.[2] The reservation was only for roads, and not for canals or other public improvements.[3]

As private corporations were afterwards formed for turnpike and other purposes, compensation was given by statute,[4] but the right of the public to sufficient land for highways was claimed in the New Jersey Constitution of 1844.[5]

In Louisiana, the use of the river-front for levees and roads was one of the conditions of ancient grants of land on the Mississippi. The riparian owner could not appropriate the river-front exclusively to his own use.[6] In constructing roads, there should be no damage done to the proprietor by obstructing a bayou; and works for the general reclamation of a large territory would require compensation to the person injured.[7] The fact that the property is wild and unimproved does not justify the legislature in

legislative grant of a right of way without previous payment of compensation is valid; and, if acted on, cannot be interfered with by a subsequent constitutional provision requiring compensation to be first paid.

[1] Bonaparte *v.* Camden R. R., Baldw. 205; Hays *v.* Risher, 82 Pa. 169; The Commonwealth *v.* Fisher, 1 Pa. 462; McClenachan *v.* Curwen, 6 Binn. 509; The State *v.* Dawson, 3 Hill (S. C.), 100; Lindsay *v.* Commissioners, 2 Bay, 38.

[2] Matter of Public Highway, 22 N. J. L. 293; The Commonwealth *v.* Fisher, 1 Pa. 462; McClenachan *v.* Curwen, 6 Binn. 509.

[3] The Commonwealth *v.* McAllister, 2 Watts, 190.

[4] The State *v.* Seymour, 35 N. J. L. 47; Doughty *v.* Somerville R. R., 7 N. J. Eq. 51.

[5] Doughty *v.* Somerville R. R., 7 N. J. Eq. 51.

[6] Hanson *v.* Lafayette, 18 La. 295.

[7] Cash *v.* Whitworth, 13 La. An. 401.

directing its appropriation for roads without compensation.[1]

§ 126. **Distinction between a taking by the state or a municipal subdivision and a taking by private corporations.** — The state is presumed to be able to pay, and to be honest, and this presumption has been frequently considered as sufficient to justify a different rule in behalf of the state, in reference to requiring previous payment of compensation, from that established in reference to private corporations, whose solvency may be doubtful.[2] The state and its municipal subdivisions are presumed to be solvent.[3] If the statute provides that the governor of the state is to sign a warrant on the treasury of the state, it is to be presumed by the courts that he will do so, and that the treasurer will pay the warrant.[4] Experience has frequently shown that in reference to the solvency of municipal corporations there may be as much doubt as to that of private corporations, and if the municipal corporation is so hampered in its taxing power that the damages could not be paid within a reasonable time, an injunction would be granted until security is given to meet the damages.[5] The United States is supposed to be honest, and able to pay damages incurred in making the coast-survey, although the appropriations made by Congress for that purpose had been irregular, and occasionally insufficient.[6] Orders on a county treasury are proper

[1] Gould *v.* Glass, 19 Barb. 179; Wallace *v.* Karlenowefski, 19 Barb. 118.

[2] Walther *v.* Warner, 25 Mo. 277; Ash *v.* Cummings, 50 N. H. 591; Rudisill *v.* The State, 40 Ind. 485; Dronberger *v.* Reed, 11 Ind. 420; Powers *v.* Bears, 12 Wis. 213; Shepardson *v.* Milwaukee R. R., 6 Wis. 605; Loweree *v.* Newark, 38 N. J. L. 151; Wheeler *v.* Essex Road Board, 39 N. J. L. 291. *Contra*, Cushman *v.* Smith, 34 Me. 247.

[3] Long *v.* Fuller, 68 Pa. 170 (the case of a school-district); Yost's Report, 17 Pa. 524 (the case of a county).

[4] Talbot *v.* Hudson, 16 Gray, 417.

[5] Keene *v.* Bristol, 26 Pa. 46.

[6] Orr *v.* Quimby, 54 N. H. 590.

compensation for land taken for public purposes by the state, and in such cases compensation need not be paid in advance.[1] It is not unconstitutional to defer payment until the state or municipal corporation can collect the compensation by the process of taxation.[2] The compensation under the legislation is based on the supposition that there may be a delay before the compensation is paid.[3] The fund to which the owner must look for his compensation must be adequate; and in California it has been held that there must be a sum set apart in the treasury before an entry can be made, even in road cases.[4] Although the taking of private property by a private corporation is a taking by the sovereign, and although the power is delegated to private corporations formed for pecuniary gain, yet it is proper to require the payment of damages in advance, or abundant security for the same.[5] Private corporations frequently have their property mortgaged, even in advance of construction, and it would be unjust to turn over an owner to the mercy of an insolvent corporation.[6] The taking by a supervisor for a public road is a taking by the state, and does not require prior compensation.[7]

§ 127. Prepayment of damages which cannot be estimated — Imperative necessity. — There are some damages

[1] Rudisill *v.* The State, 40 Ind. 485; Jeffersonville R. R. *v.* Daugherty, 40 Ind. 33; Dronberger *v.* Reed, 11 Ind. 420; Brock *v.* Hishen, 40 Wis. 674.

[2] Hamersley *v.* New York, 56 N. Y. 533 (qualifying Chapman *v.* Gates, 54 N. Y. 132); Hatermehl *v.* Dickson, 8 Phila. 282; Brock *v.* Hishen, 40 Wis. 674.

[3] Detmold *v.* Drake, 46 N. Y. 318.

[4] Sanborn *v.* Belden, 51 Cal. 266; Brady *v.* Bronson, 45 Cal. 640; Grigsby *v.* Burtnett, 31 Cal. 406.

[5] Dronberger *v.* Reed, 11 Ind. 420; Powers *v.* Bears, 12 Wis. 218.

[6] Phifer *v.* Carolina R. R., 72 N. C. 433.

[7] McOsker *v.* Burrell, 55 Ind. 425. The Constitution of Indiana, art. I., § 21, is as follows: "No man's property shall be taken by law, without just compensation; nor, except in case of the state, without such compensation first assessed and tendered."

which cannot be estimated in advance. In such cases it would be impossible to pay or secure compensation in advance. Where the payment of compensation is reasonably certain, and the amount cannot be easily ascertained, the strict rule has been relaxed. This is the doctrine of the Supreme Court of New Hampshire in Orr *v.* Quimby,[1] where the damages consisted of occupation and temporary works for the purpose of exploring, surveying, and triangulating the coast of New Hampshire, under the United States Coast-Survey. This case seems to have been decided with a desire not to interfere with the completion of what the court deemed to be a public work of great importance and benefit to the state, for in the prior case of Ash *v.* Cummings[2] the court held that the damages must be paid in advance, notwithstanding the difficulty of arriving at the damages before the taking. The difficulty of ascertaining the damages is one to be met by the party condemning.

There are exigencies[3] where the state may require the property immediately, and without compensation to the owner. Such are the calamities of fire or pestilence. There must, however, be an imperative necessity to justify an entry on private property without compensation; and the ordinary progress of public works is not such as to justify such entry without compensation.[4]

§ 128. **Statutes or charters failing to provide compensation do not authorize the exercise of eminent domain.**— By holding that the statute which pretends to take private property for public use, without compensation, is inoperative to exclude the common-law remedies, the courts substantially hold the acts to be unconstitutional. Some

[1] 54 N. H. 590.
[2] 50 N. H. 591.
[3] See Ch. L, § 5.
[4] Penrice *v.* Wallis, 37 Miss. 172; Watkins *v.* Walker County, 18 Texas, 585.

courts have gone further, and distinctly declared such acts to be unconstitutional and void.[1] The constitutional provision requiring compensation does not execute itself,[2] and a corporation would be restrained from entering until the compensation was paid.[3] If compensation is not provided, the law will conclude that it was not the intention of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those thus affected,[4] or on payment of compensation, outside of the charter.[5] A charter which grants other valuable privileges in connection with the power to condemn, would not be void because no compensation was provided, but the authority to condemn could not be exercised. The company might purchase, and then enjoy the other privileges of their charter.[6] If the remedy is inadequate, the common-law remedies of trespass and ejectment remain to the owner,[7] or possession and entry may be enjoined.[8] Acts are to be construed so as to require compensation, if possible.[9] General acts providing the remedy control special acts not providing compensation, for the reason that the special acts are supposed to be in

[1] Thacher v. Dartmouth Bridge, 18 Pick. 501; Easton v. Amoskeag Co., 44 N. H. 143; Mount Washington Road, 35 N. H. 134; Boston R. R. v. Salem R. R., 2 Gray, 1; Parham v. Justices, 9 Ga. 341; Watkins v. Walker County, 18 Texas, 585; Beckwith v. Beckwith, 22 Ohio St. 180; Watson v. Trustees, 21 Ohio St. 667.

[2] Watson v. Trustees, 21 Ohio St. 667.

[3] Shute v. Chicago R. R., 26 Ill. 436.

[4] Boston R. R. v. Salem R. R., 2 Gray, 1; Thacher v. Dartmouth Bridge Co., 18 Pick. 501; Wellington, petitioner, 16 Pick. 87; Shute v. Chicago R. R., 26 Ill. 436.

[5] Gray v. St. Paul R. R., 13 Minn. 315.

[6] Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Carson v. Coleman, 11 N. J. Eq. 106.

[7] Denslow v. New Haven Co., 16 Conn. 98; The People v. Nearing, 27 N. Y. 306.

[8] Anderson v. Turbeville, 6 Coldw. 150; McCann v. Sierra County, 7 Cal. 121.

[9] Harrisburg v. Crangle, 3 Watts & S. 460.

contemplation of the general act, and this construction will save them from being unconstitutional.[1] It has been argued that if there is no effectual remedy provided for obtaining the compensation which is recognized to be requisite in this act, the act will not be void, for the legislature may supply a remedy by a subsequent enactment;[2] but really the obligation is no stronger on a future legislature than on the legislature which passed the act without providing a remedy, and there is no greater reason for relying on one than the other.[3] To recognize in the act that an owner was entitled to compensation, and to neglect to provide him any means for obtaining the same, is worse than failing to recognize the right.

§ 129. **Preliminary occupation.** — The Supreme Court of Maine seem to permit a temporary occupation of land, incipient to the acquisition of title in land, or to an easement in it, without compensation. The title of the corporation must be perfected within a reasonable time, which the statute fixes at three years. Until that time has expired, the occupation would not be a trespass.[4] This, however, was under a special statute. The general rule is that preliminary occupation shall be only as an incipient proceeding to the acquisition of title or easement.[5] Under such an occupation the company could not claim a right in fee. If such a claim is set up, the company would be a trespasser *ab initio*.[6] The right to such temporary occupation as an incipient proceeding will become extinguished by an unreasonable delay to perfect proceedings (including the actual payment or tender of compensation) to acquire the title to the land, or the

[1] Harrison *v.* Courtwright (C. P., Luzerne Co., Pa.), Leg. Gaz., 1875.
[2] The State *v.* Seymour, 35 N. J. L. 47.
[3] Buffalo R. R. *v.* Ferris, 26 Texas, 588.
[4] Nichols *v.* Somerset R. R., 43 Me. 356.
[5] *Ante*, § 36.
[6] Hall *v.* Pickering, 40 Me. 548.

necessary easement; and in cases of neglect, damages might be recovered for all the prior occupation.[1]

§ 130. **Payment a condition precedent to entry.** — Payment must be made before entry, where the owner insists on this right. An entry without payment is a trespass.[2] The owner cannot be compelled to institute proceedings, and can rely on his own constitutional protection, and may insist that the corporation shall tender him the damages assessed before entry.[3] He need not await the collection of damages by assessments.[4] And the order cannot be made authorizing possession to be taken without payment, or staying all actions on account of taking such possession.[5] An injunction may issue to prevent the taking of possession; or the owner may waive his right to an injunction, and sue for his damages,[6] or for the possession of his property.[7] The right of the owner to an injunction in such cases cannot be affected by a statute declaring that no injunction shall be granted until the damages had been ascertained. Such statute would not be constitutional when the owner resisted the entry.[8] The title does not pass until payment made.[9]

[1] Cushman *v.* Smith, 34 Me. 247.

[2] Brown *v.* Powell, 25 Pa. 229; Memphis R. R. *v.* Payne, 37 Miss. 700; Henry *v.* Dubuque R. R., 10 Iowa, 540; Ray *v.* Atchison R. R., 4 Neb. 439; Johnson *v.* Alameda County, 14 Cal. 106.

[3] Cox *v.* Louisville R. R., 48 Ind. 178; Graham *v.* Columbus R. R., 27 Ind. 260. Under the old Constitution of Indiana, payment was not made a condition precedent to entry.

[4] Commissioners of Highways *v.* Durham, 48 Ill. 86; Lafayette *v.* Shultz, 44 Ind. 97. *Contra*, under old Constitution, McCormick *v.* Lafayette, 1 Ind. 48; Rubottom *v.* McClure, 4 Blackf. 505.

[5] Loomis *v.* Andrews, 49 Cal. 289.

[6] Mayor *v.* Perkins, 30 Ga. 154. As to injunctions, Commissioners of Highways *v.* Durham, 48 Ill. 86; West Maryland R. R. *v.* Owings, 15 Md. 199; Bohlman *v.* Green Bay R. R., 30 Wis. 105; Powers *v.* Bears, 12 Wis. 218.

[7] Graham *v.* Columbus R. R., 27 Ind. 260; Cox *v.* Louisville R. R., 48 Ind. 178.

[8] Bohlman *v.* Green Bay R. R., 30 Wis. 105.

[9] New Orleans R. R. *v.* Lagarde, 10 La. An. 150; Gillan *v.* Hutchinson, 16 Cal. 153.

The payment must be an entire payment. If only part of the compensation is paid, the owner may reënter and treat the land as his own.[1] An appeal-bond without a deposit of damages is not a payment.[2] That bond is simply for the prosecution of the appeal.[3] If the owner has the land undisturbed until payment of damages, there should not be a judgment for the amount of the compensation, and execution thereon, but an order authorizing entry on payment of damages.[4]

§ 131. **Judgment not compensation.** — A mere judgment, which might turn out to be wholly uncollectible, cannot be considered just compensation. Before title can be absolutely vested by virtue of condemnation proceedings, payment becomes indispensably necessary.[5] And if the property nominally passes, it passes subject to the condition that the price shall be subsequently paid; so that, if for any cause it be not paid, the party may repossess himself of it on account of condition broken.[6] An execution on a judgment to be rendered two terms after the taking cannot be considered adequate compensation, unless there is a substantial guaranty fund to secure the payment of such judgment.[7] An arbitration, with not even a judgment by which the award could be enforced, is not compensation.[8] A submission to arbitration is not a waiver of the payment of the award before entry.[9] A judgment that is not paid does not operate as compensation; and the fact that execution was

[1] Colton *v.* Rossi, 9 Cal. 595.
[2] Ray *v.* Atchison R. R., 4 Neb. 489.
[3] Ring *v.* Mississippi Bridge, 57 Mo. 496.
[4] Peoria R. R. *v.* Railroad, 66 Ill. 174; Chicago R. R. *v.* Bull, 20 Ill. 218; St. Louis R. R. *v.* Wilder, 17 Kan. 239.
[5] Provolt *v.* Chicago R. R., 57 Mo. 256; Powers *v.* Armstrong, 19 Ga. 427; Thompson *v.* Grand Gulf R. R., 3 How. (Miss.) 240.
[6] Walther *v.* Warner, 25 Mo. 277.
[7] Buffalo R. R. *v.* Ferris, 26 Texas, 588.
[8] South-Western R. R. *v.* Southern Telegraph Co., 46 Ga. 43.
[9] Stewart *v.* Raymond R. R., 7 Smed. & M. 568.

stayed by the owner for two years would not render the proceeding a purchase on the part of the company. Possession taken under such a proceeding is by virtue of a parol license, which is revocable by the owner. Upon a revocation, the owner, in default of payment, would be entitled to an injunction.[1]

§ 132. **Right to sue not compensation.** — The constitutional provision requiring just compensation is not satisfied by imposing upon the owner the burden of pursuing an expensive remedy, and leaving him exposed to the risk of obtaining judgment and satisfaction.[2] The owner should be free from such burden and risk.[3] It is not enough that the owner may have his action to recover his damages.[4]

§ 133. **Consideration of public welfare not compensation.** — While the public are not to lose the benefit of improved modes of travel, or other great improvements, by the reluctance or obstinacy of individuals in refusing to give up their property for the public good, yet the public should be compelled to pay for its benefits. The burden of benefiting the public is not to be imposed upon the individual alone, and no considerations of the benefit to the public can stand in lieu of compensation.[5]

§ 134. **Consent of authorities cannot affect the payment of damages.** — The grant of the legislature, or of the legislative body of any of the municipal subdivisions of the state, cannot operate to transfer private property or to release damages.[6] Such consent and authority can only operate to

[1] Irish *v.* Burlington R. R., 44 Iowa, 380.
[2] Avery *v.* Fox, 1 Abb. U. S. 246.
[3] Bonaparte *v.* Camden R. R., Baldw. 205.
[4] Mount Washington Road, 35 N. H. 134; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.
[5] Enfield Bridge *v.* Hartford R. R., 17 Conn. 40.
[6] Williams *v.* Natural Bridge Plank-Road, 21 Mo. 580.

protect the party occupying the street or property from indictment as a public nuisance, but not against the claims of private individuals, arising from injuries to their rights.[1]

§ 135. **Compensation in money — Just compensation.** — Nothing except money can be forced on the owner of lands condemned, in payment of his damages.[2] He cannot be compelled to take other land,[3] or the bonds of the company,[4] as compensation. An order on a particular fund not shown to contain any money is not sufficient; but if the damages were set apart in the treasury for the owner, the constitutional requirement would be satisfied.[5] Unpaid acceptances are not compensation, and the owner may call for the protection of a court of equity to secure his property until the compensation is in fact paid.[6] Particular easements or conditions cannot be forced on the parties against their will, in reduction of damages;[7] and there is a very respectable showing of authorities to the effect that a payment in benefits is not a payment in money, or a just compensation to the owner.[8] "Just compensation" and "damages" are supposed to be synonymous terms.[9] Neither term is satisfied with the simple value of a strip of land taken, when

[1] Fletcher *v.* Auburn R. R., 25 Wend. 462; Matter of Prospect Park R. R., 15 N. Y. Sup. Ct. 30; Sinnickson *v.* Johnson, 17 N. J. L. 129; Morris R. R. *v.* Hudson Tunnel R. R., 25 N. J. Eq. 384; Southern Pacific R. R. *v.* Reed, 41 Cal. 256.

[2] The Commonwealth *v.* Peters, 2 Mass. 125; Railroad Co. *v.* Halstead, 7 W. Va. 301; Woodfolk *v.* Nashville R. R., 2 Swan, 422; Arnold *v.* Covington Bridge, 1 Duv. 372.

[3] Van Horne's Lessee *v.* Dorrance, 2 Dall. 304.

[4] Hamilton *v.* Annapolis R. R., 1 Md. Ch. 107.

[5] Murphy *v.* De Groot, 44 Cal. 51.

[6] Harness *v.* Chesapeake Canal, 1 Md. Ch. 248.

[7] Railroad Co. *v.* Halstead, 7 W. Va. 301; Chicago R. R. *v.* Melville, 66 Ill. 329.

[8] Isom *v.* Mississippi R. R., 36 Miss. 300; Brown *v.* Beatty, 34 Miss. 227; Buffalo R. R. *v.* Ferris, 26 Texas, 588; Elizabethtown R. R. *v.* Helm, 8 Bush. 681; Sutton's Heirs *v.* Louisville, 5 Dana, 28; Alabama R. R. *v.* Burkett, 42 Ala. 83; Marcy *v.* Fries, 18 Kan. 353. See *post*, Ch. XIV.

[9] Henry *v.* Dubuque R. R., 2 Iowa, 288.

other damages have been suffered by the taking, nor by turning the owner over to litigation.[1] Benefits are not to be included in just compensation.[2]

In a recent case in New Jersey,[3] the method of remuneration provided was the issue, by the commissioners, of improvement certificates, in their own names, therein and thereby pledging the faith and credit of the cities of Jersey City and Hoboken, payable at such times as they may designate, not exceeding two years from the date of issue, bearing interest at the rate of seven per cent from the date of issue. Such provision was held not to be a just compensation. The compensation must be in money. The power to postpone the right of the owner to receive his price, for one day, or to substitute for it something other than money, is a power to postpone payment so long that the land-owner may be ruined, and to pay in something of little pecuniary value at the time of its reception.

§ 136. **Bond to secure damages — Bond pending appeal.** — The constitutions of some of the states provide that entry may be made after security is given for the payment of compensation. This clause is satisfied by a bond approved by the court. An entry before bond given is a trespass.[4] The execution of such a bond will stay an action of ejectment.[5] Such bonds cover damages for construction, as well as of the value of the property.[6] In the absence of such constitutional provision, a bond would not be just compensation. The legislature might as well declare a bond to be good compensation at the end of the condemnation proceedings, as at the beginning. Hence pos-

[1] Virginia R. R. v. Henry, 8 Nev. 165.
[2] Alabama R. R. v. Burkett, 42 Ala. 83.
[3] Butler v. Sewer Commissioners, 39 N. J. L. 665.
[4] Dimmick v. Broadhead, 75 Pa. 464; Carr v. Georgia R. R., 1 Ga. 524.
[5] Harrisburg v. Crangle, 3 Watts & S. 460.
[6] Wadhams v. Lackawanna R. R., 42 Pa. 303.

session cannot be given simply on an offer to give or on the giving of a bond.[1] Such an order would be void, and the owner could maintain a trespass on such entry, or might by *certiorari* take up the proceedings and have the order rescinded.[2] A bond given in this manner would not cover damages in case the corporation abandoned proceedings.[3]

In case the damages have been approximately ascertained by one assessment, statutes generally allow an entry to be made on giving bond to secure the payment of judgment to be obtained on appeal. An entry without the execution of such bond is illegal, and subjects the party entering to a recovery back of the premises under the forcible entry and detainer laws.[4] The question of the sufficiency of such bond is to be determined by the court below, and cannot be inquired into on appeal.[5] The owner of property taken should not be compelled to give bond on his own appeal.[6]

§ 137. **Entry pending appeal.** — Neither party may be satisfied with the first assessment of damages, and may desire a new assessment in an appellate court, or may further desire to have questions of law settled by the courts of last resort. If an appeal is given by law, and the owner avails himself of it, he is entitled, in the absence of provisions to the contrary, to the possession of his land during its pendency, and to an injunction, if necessary, to protect such possession,[7] even though the appraisers found that no

[1] Sanborn *v.* Belden, 51 Cal. 266; San Mateo Water-Works *v.* Sharpstein, 50 Cal. 284; Ferris *v.* Bramble, 5 Ohio St. 109.

[2] California Pacific R. R. *v.* Central Pacific R. R., 47 Cal. 528.

[3] Davis *v.* San Lorenzo R. R., 47 Cal. 517.

[4] Mitchell *v.* Illinois R. R., 68 Ill. 286.

[5] Rippe *v.* Chicago R. R., 22 Minn. 44.

[6] The People *v.* McRoberts, 62 Ill. 38. See also Nebraska R. R. *v.* Van Deusen (Sup. Ct. Neb.), 5 Cent. L. J., 1877. The report in the *Journal* is so uncertain that it would admit of the construction that the company might appeal without bond.

[7] Eidemiller *v.* Wyandotte, 2 Dill. 376; Kansas City *v.* Kansas Pacific R. W., 18 Kan. 331.

damages were suffered. *Non constat* that, on the appeal, damages will be awarded.[1] The property is not taken actually until the amount assessed on appeal is paid. If the original award is deposited in court, and a less amount is found on appeal, the deposit is security; and if a greater amount, the owner can enjoin the absolute appropriation until the amount is paid.[2] The payment of the judgment on appeal can be enforced with the same remedies with which the original judgment might have been enforced, although entry has been made. The corporation may be enjoined from using the property until the amount is paid. There is a vendor's lien when property is sold, and *à fortiori* the doctrine should apply where property is seized *in invitum*, in derogation of common law. The owner, in such case, need not have recourse to ejectment, or apply to have a receiver appointed. His best remedy is injunction until the damages are paid.[3]

§ 138. **Deposit pending an appeal.** — In order to allow the work of construction to proceed during the pendency of an appeal, a provision is generally made that a deposit of an amount sufficient to cover the original judgment shall be made.[4] If this deposit is not made, and an effort is made to enter, such entry may be restrained by injunction. An offer, in the injunction proceedings, to deposit the highest probable amount, in order to have the injunction dissolved, will not avail. The deposit should be made in the original proceedings.[5] The fact that a higher amount was awarded on appeal does not make the corporation trespassers *ab initio*.[6] The deposit, pending the appeal, belongs to the owner, and cannot be retained by the court. The owner

[1] Trustees *v.* Davenport, 7 Iowa, 213.
[2] Peterson *v.* Fereby, 30 Iowa, 327.
[3] Evans *v.* Missouri R. R., 64 Mo. 453.
[4] Matter of New York Central R. R., 60 N. Y. 116.
[5] Eidemiller *v.* Wyandotte, 2 Dill. 376.
[6] Schuler *v.* Railroad, 3 Whart. 555.

has a right to the use of the money or the land, and the company might not be liable for interest as the amount was deposited, or might not be able to pay at the end of the litigation. Hence in a suit against a judge for retaining the deposit pending the appeal, the owner recovered judgment for the amount of the deposit.[1]

§ 139. **Tender pending an appeal.** — The corporation may not desire to await the end of the litigation, when the owner appeals, and hence it is provided that an entry may be made if the compensation already assessed is tendered, notwithstanding a reassessment has been or may be ordered.[2] The amount found due on appeal must be paid before the title passes, and if that is not paid, the owner may have ejectment[3] or trespass.[4] A tender of the amount found due below does not pass the title, as it cannot be known what is the proper amount to tender until that is determined on appeal.[5] Besides, in case the owner appealed, the tender might be withdrawn by the corporation, and proceedings discontinued.[6] If the company is dissatisfied with the award, it may tender the amount and enter, and still appeal the question of damages.[7] The correct amount must be tendered, and if there is a dispute pending as to whether the interest and costs should be added, a court of equity will enjoin the entry until it is decided whether a full tender has been made; but the court would release the injunction on payment into court of the amount, with the disputed interest and costs, which interest and costs should be paid to the owner if so adjudged.[8]

[1] Meily *v.* Zurmehly, 23 Ohio St. 627.

[2] Somerville R. R. *v.* Doughty, 21 N. J. L. 442; Levering *v.* Philadelphia R. R., 8 Watts & S. 459; Mercer *v.* Williams, Walk. Ch. (Mich.) 85.

[3] Levering *v.* Philadelphia R. R., 8 Watts & S. 459.

[4] Colvill *v.* Langdon, 22 Minn. 565.

[5] Colvill *v.* Langdon, 22 Minn. 565.

[6] Blackshire *v.* Atchison R. R., 13 Kan. 514.

[7] Indianapolis R. R. *v.* Brower, 12 Ind. 374.

[8] Mettler *v.* Easton R. R., 25 N. J. Eq. 214.

§ 140. **Waiver of prepayment by allowing entry to be made.** — The owner may, by his actions, waive his right to the prepayment of damages. The courts should not be ingenious in drawing inferences of a waiver, where corporations are to be benefited, which would be scouted were natural persons concerned. The fact that the public would be discommoded by the owner's persistence adds nothing to the presumption of waiver. The public have no interest in a completed public improvement which should cause the rights of the owner of land to be disregarded.[1] Slight acts of acquiescence on the part of the owner will estop him from interfering with the running of a railroad. He will not be deprived of his claim for damages, or his right to enforce it in all proper modes; but if he has, in any sense, for the shortest period, clearly given the corporation, either by his express consent or by his silence, to understand that he did not intend to object to their proceeding with the construction and operation, he cannot, on non-payment of compensation, maintain ejectment. If there was a waiver in fact, either express or implied, by acquiescing in the proceedings of the company to the extent of not insisting upon prepayment as a condition precedent, but consenting to let the damages lie and remain a mere debt, with or without a lien upon the road-bed, then it is impossible to regard the corporation, in any sense, in the light of trespassers, or liable in ejectment.[2] The inquiry should be, What is the fair inference from the conduct of the parties? If the owner was not present, and therefore could not object, he might still maintain his action of ejectment on non-payment of damages. The owner is not bound to be present and object.[3]

§ 141. **Continued assent to use.** — Although there may be defects in the condemnation proceedings, yet if the owner

[1] Evans *v.* Missouri R. R., 64 Mo. 453.

[2] Provolt *v.* Chicago R. R., 57 Mo. 256; Smart *v.* Portsmouth R. R., 20 N. H. 233; McAulay *v.* Western R. R., 33 Vt. 311.

[3] Walker *v.* Chicago R. R., 57 Mo. 275.

does not prevent the execution of the work, and stands by for years and allows the company to make valuable improvements on the land, the law would protect the company in the enjoyment of the property used in connection with such occupation, and if compelled to leave the premises by proper proceedings, would permit such property to be removed.[1] The owner may by inaction estop himself from maintaining an action of ejectment, but may cause the company to be placed in the hands of a receiver until the damages are paid from the earnings.[2] No assent to use will carry the title when compensation has not been paid.[3] After an entry has been made without opposition, the owner cannot take advantage of formal errors, such as the omission of the company to have a certificate of survey properly recorded,[4] or of selectmen to file certificate of opening.[5] An injunction will not lie until all the ordinary means of obtaining the indemnity are tried and have proved unsuccessful,[6] and especially if parties have slept on their rights and failed to disclose their titles.[7] The owner cannot stipulate to be entitled to an injunction in case of failure of company to fulfil its contracts after an entry has been made.[8] A change of use from a canal to a railroad, if acquiesced in by an owner, cannot give such owner a right to an injunction to prevent the operation of the road. The remedy must be at law.[9]

§ 142. Where original entry is lawful — Delay in perfecting title. — After a lawful entry has been made by the

[1] Dietrich *v.* Murdoch, 42 Mo. 279.

[2] Provolt *v.* Chicago R. R., 57 Mo. 256; McAulay *v.* Western R. R., 33 Vt. 311; 2 Redf. Am. Railw. Cas. 253.

[3] Evansville R. R. *v.* Grady, 6 Bush. 144.

[4] Troy R. R. *v.* Potter, 42 Vt. 265.

[5] Felch *v.* Gilman, 28 Vt. 88.

[6] Hentz *v.* Long Island R. R., 13 Barb. 646, referring to case of Hodgkinson *v.* Long Island R. R. (unreported).

[7] Ross *v.* Elizabethtown R. R., 2 N. J. Eq. 422; Scudder *v.* Trenton Falls Co., 1 N. J. Eq. 694; Baltimore R. R. *v.* Strauss, 37 Md. 237.

[8] Coe *v.* Columbus R. R., 10 Ohio St. 372.

[9] Goodin *v.* Canal Co., 18 Ohio, 169.

consent of the owner, or on a tender made, the parties entering cannot be considered as trespassers, although they afterward fail to pay the award. There may be an action for the money due, but not in trespass.[1] An original entry by the consent of a tenant for life is lawful, and will not subject the party entering to an action of ejectment on the part of the remainder-man, although damages have not been paid. Other remedies must be sought.[2] An agreement to take land-damages in stock foregoes the right to have the damages ascertained before entry, and prevents the owner from hindering the progress of the work, or claiming a lien on the roadway, or of pursuing an action of ejectment.[3] The owner cannot obstruct the road although the damages have not been paid.[4] The consent to enter must be acted on, or the license may be revoked.[5] Ejectment will not be permitted when the original entry was under a constitution which did not require prior compensation. The damages must be paid, but cannot be recovered in that action.[6] Although consent was originally given, the owner has been held entitled to ejectment on notice of the intention to bring such action in the event that the damages were not paid,[7] but there would be no eviction until a refusal to pay after reasonable notice given.[8] If the consent had not been originally given, the company would have proceeded with a regular condemnation, and it would

[1] Rossiter v. Russell, 18 N. H. 73; Louisville R. R. v. Thompson, 18 B. Mon. 785.

[2] Austin v. Rutland R. R., 45 Vt. 215.

[3] Knapp v. McAuley, 39 Vt. 275; McAulay v. Western R. R., 33 Vt. 311.

[4] Chapman v. Gates, 54 N. Y. 132.

[5] Miller v. Auburn R. R., 6 Hill, 61. When the license has been acted on, it cannot be revoked. Knapp v. London, etc., Rail. Co., 32 L. J. (Exch.) 236; Doe d. Hudson v. Leeds Rail. Co., 20 L. J. (Q. B.) 486.

[6] Den v. Morris Canal Co., 21 N. J. L. 587.

[7] Smith v. Chicago R. R., 67 Ill. 191; Chicago R. R. v. President Knox College, 34 Ill. 195.

[8] Chicago R. R. v. President Knox College, 34 Ill. 195.

be a harsh measure to enjoin the operation of the public improvement under such circumstances.[1] Opportunity should be given the company to acquire the title and pay the damages, especially where the title has not passed on account of defects in the condemnation proceedings which were instituted in good faith;[2] and in such case the judgment might be that the injunction should not issue if the defendant forthwith institutes proceedings to condemn, and promptly prosecutes the same, — otherwise to be granted.[3]

Notwithstanding the original entry is lawful, yet the company may be guilty of such delay in perfecting the title and paying the damages as to render it a trespasser *ab initio*.[4]

§ 143. **Acquiescence not a waiver of damages.** — Although an owner may acquiesce in the location of a road, and accommodate his fences to the new road, yet that will not constitute a waiver of a reassessment of damages by a jury.[5] Acquiescence must be continued for the statutory time of limitations to constitute a bar to an action for the recovery of the premises. There is no presumption that a trespass is a benefit, or that it has been waived by allowing its continuance.[6] Where the title does not pass until payment, the owner does not waive his title or occupation from the mere fact that the company has entered without payment, nor from the fact that the owner has appealed from the award. By appealing he gives notice that a larger amount must be paid before the title shall pass; and if entry

[1] Vilas *v.* Milwaukee R. R., 15 Wis. 233; Pettibone *v.* Lacrosse R. R., 14 Wis. 443.

[2] Lohman *v.* St. Paul R. R., 18 Minn. 174.

[3] Harrington *v.* St. Paul R. R., 17 Minn. 215.

[4] Bloodgood *v.* Mohawk R. R., 14 Wend. 51.

[5] Endicott, petitioner, 24 Pick. 339.

[6] Chicago *v.* Wright, 69 Ill. 318; Toledo R. R. *v.* Darst, 61 Ill. 231 (qualifying Curry *v.* Mount Sterling, 15 Ill. 320); Ferris *v.* Ward, 9 Ill. 499, where it was presumed that the damages were waived because they were not claimed.

is made under such circumstances, the owner may maintain ejectment,[1] and in some cases have an injunction.[2] The court, however, would grant a reasonable stay of proceedings, to give time for the corporation to pay the damages and interest; and, if that is not done, possession would be given.[3]

§ 144. **Lien on land for compensation — Change of corporations — Subsequent purchase of franchise.** — Some authorities argue that, as a condemnation is a forced sale, there remains a lien on the land for the unpaid purchase-money, which would follow the land into the hands of a subsequent purchaser of the franchise.[4] If no title passes until compensation is paid, the subsequent purchaser or mortgagee would only take the interest of his vendor or mortgageor, which would be the land subject to the claim of the original owner, and the operation of the improvement may properly be enjoined until the compensation is paid, especially where the original corporation is insolvent.[5] The owner would have a lien for land damages and for damages for refusal to construct the road according to contract, even against a subsequent purchaser of the road.[6] The sale or mortgage of its property by a corporation does not affect the right of the owner to his compensation unpaid. Although the trespass of entry without compensation may

[1] St. Joseph R. R. v. Callender, 13 Kan. 496.

[2] Richards v. Des Moines R. R., 18 Iowa, 259; Blanchard v. Maysville Turnpike, 1 Dana, 86.

[3] Conger v. Burlington R. R., 41 Iowa, 419; Hibbs v. Chicago R. R., 39 Iowa, 340.

[4] Doctrine denied in Forward v. Hampshire Canal Co., 22 Pick. 462; The People v. Michigan Southern R. R., 8 Mich. 496. This is the English doctrine. Sedgwick v. Watford Rail. Co., 36 L. J. (Ch.) 879; Viner v. Hoylake Rail. Co., 17 W. R. 92.

[5] White v. Nashville R. R., 7 Tenn. 518; Dayton R. R. v. Lewton, 20 Ohio St. 401. Or a receiver of the income may be appointed. Pell v. Northampton Rail. Co., L. R. 2 Ch. Ap. 100; Lewes v. Cambrian Rail. Co., 36 L. J. (Ch.) 565.

[6] Dayton R. R. v. Lewton, 20 Ohio St. 401.

be waived, the claim for damages is not waived, and the corporation in possession of and operating the improvement must pay the damages, unless they can show some conduct of the owner estopping him from setting up such claim,[1] and the purchasing company may be enjoined from operation until the damages are settled.[2] A mortgage can only cover the interest of the mortgageor, and if the title has never passed from the original owner, for the reason that the compensation has not been paid, he may enjoin the operation of the road until his compensation is paid. There can be no innocent purchaser from him who never had a title.[3] The lessee of a railroad is in no better position than the lessor. Both may be enjoined.[4] The old debts and judgments against a corporation which has sold out its property cannot be enforced, as such, against the corporation which succeeds it, but the operation of the improvement constructed over the land of an owner whose damages have not been paid may be restrained until that compensation is paid.[5] There may be such a delay in asserting the claim that it will not be considered by the courts. In Michigan, a delay of eight years after a sale of a railroad by the state was held to prevent maintaining a claim against the purchaser.[6] In Wisconsin, it is considered that no delay, except for the statutory limitation against real, not civil, actions, would operate to bar a claim or raise the presumption of a waiver.[7] Such sales are ordinarily made by insolvent corporations, and it would be a hardship to raise a

[1] West Pennsylvania R. R. v. Johnston, 59 Pa. 290. Consent to enter does not waive the lien. Munns v. Isle of Wight Rail. Co., 17 W. R. 1081.

[2] Gilman v. Sheboygan R. R., 40 Wis. 653; Dayton R. R. v. Lewton, 20 Ohio St. 401.

[3] White v. Nashville R. R., 7 Tenn. 518; Gilman v. Sheboygan R. R., 40 Wis. 653; Pfeifer v. Sheboygan R. R., 18 Wis. 155.

[4] Hibbs v. Chicago R. R., 89 Iowa, 340. Especially if the lessee is a foreign corporation. Holbert v. St. Louis R. R., 45 Iowa, 23.

[5] Gilman v. Sheboygan R. R., 37 Wis. 319.

[6] The People v. Michigan Southern R. R., 3 Mich. 496.

[7] Gilman v. Sheboygan R. R., 37 Wis. 319.

presumption of waiver against an owner, short of the limitation for real actions.

The Pennsylvania Constitution of 1838, art. VII., sec. 4, is as follows: "The Legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, *or give adequate security therefor*, before such property shall be taken." Further legislation provided for a bond, which was to be approved by the court and filed in court, for the benefit of those interested. The Southern Pennsylvania Iron and Railroad Company gave bond which was satisfactory to the court, and entered. Subsequently their property and franchises were sold out under a mortgage, and bought in by the Southern Pennsylvania Railroad and Mining Company. The owner obtained a judgment on his assessment of damages, and attempted to levy out of the property held by the purchaser at the mortgage-sale. The Supreme Court of Pennsylvania held that the purchaser took a clear title, unencumbered by any lien, and the land-owner was remitted to his action on the bond.[1]

§ 145. **Refusal of officers to pay compensation assessed.** — On refusal of public officers to pay damages which have been assessed, they may be compelled by *mandamus* to pay the damages,[2] or to levy taxes and collect the damages,[3] or to issue the bonds authorized for that purpose,[4] or to draw the proper vouchers[5] or warrants,[6] or to audit the accounts and collect the damages.[7] In such an

[1] Fries *v.* Southern Pennsylvania R. R. and Mining Co., 85 Pa. 73.

[2] Treat *v.* Middletown, 8 Conn. 243; Justices *v.* Jefferson, 1 Coldw. 419; The People *v.* Lowell, 9 Mich. 144.

[3] Johnston *v.* Supervisors, 19 Johns. 272; Miller *v.* Bridgewater, 24 N. J. L. 54; Higgins *v.* Chicago, 18 Ill. 276; Brock *v.* Hishen, 40 Wis. 674; The State *v.* Keokuk, 9 Iowa, 438.

[4] Duncan *v.* Louisville, 8 Bush, 98.

[5] Ryan *v.* Hoffman, 26 Ohio St. 109.

[6] Rudisill *v.* The State, 40 Ind. 485.

[7] The State *v.* Wilson, 17 Wis. 687.

action the condemning party cannot dispute the correctness of the amount awarded, or take advantage of any irregularities in the proceedings,[1] especially when possession has been taken. Irregularities in proceedings, errors in amount of award, fraud or misconduct of officers, cannot be set up as a defence to such an action, as the proper remedy would have been an appeal in the original proceedings.[2] If the road has never been opened or used, and there were irregularities in the laying-out, a *mandamus* would not lie to compel the payment of the damages.[3] When the amount has been ascertained, a direct suit may be brought against the city or town for the amount appropriated for the payment of damages.[4]

§ 146. **Payment to wrong claimant.** — The true owner must be compensated, and payment to another, although made in good faith, is no defence to the action of the owner,[5] and no entry could be made on proceedings which ignored the true owner.[6] The true owner, by afterwards suing for damages, affirms the seizure, and treats the action of the condemning party as he might treat a conversion of personal property.[7] Payment to one tenant in common does not operate to divest the title of the other tenant, or his claim for damages.[8] The condemning party may call on the claimant to show his title. Title is one of the questions to be tried as between the condemning party and the claimant. If the claimant has no title, he should receive no damages. Although the name may be inserted in the list of the owners, he could not recover damages unless he was in fact the owner.[9]

[1] Higgins *v.* Chicago, 18 Ill. 276; The People *v.* Lowell, 9 Mich. 144.
[2] The People *v.* La Grange, 2 Mich. 187; Higgins *v.* Chicago, 18 Ill. 276.
[3] The People *v.* Scio, 8 Mich. 121.
[4] Mayor *v.* Richardson, 1 Stew. & P. 12.
[5] Missouri R. R. *v.* Owen, 8 Kan. 409; Tamm *v.* Kellogg, 49 Mo. 118.
[6] Hood *v.* Finch, 8 Wis. 381.
[7] Tamm *v.* Kellogg, 49 Mo. 118.
[8] Brinckerhoff *v.* Wemple, 1 Wend. 470.
[9] Allyn *v.* Providence R. R., 4 R. I. 457.

§ 147. **Refusal to take money — Failure to claim.** — If the owner refuses to take the compensation awarded, the court may order the amount to be paid into court for his use, and thereupon the condemning party is justified in entering on the premises.[1] After such deposit, the title passes, and no refusal on the part of the owner, or protest, will constitute the condemning party a trespasser.[2] If the owner obstructs the progress of the work, he will be liable criminally; but an injunction will not be granted because he has refused to receive the money and threatens to obstruct the road.[3] A claim for damages is not to be presumed, but must be made at the proper time, so that if the authorities think the payment of damages too great a sacrifice for the benefits to be obtained, they may abandon, and locate elsewhere.[4]

§ 148. **Ownership of improvements made during unlawful occupation.** — We have seen that in most states the title does not pass until compensation made, and that an entry made before that time is a trespass. A trespasser is not entitled to any benefit for improvements made on the land during the time of his occupation. Houses erected on the land of another belong to the owner, without compensation to the party erecting, except where legislatures have granted relief to those who have made improvements on land in good faith, believing they had good title. The rule follows, that all erections belong to the owners, and cannot be removed by the parties placing them there; and hence on a subsequent condemnation the value of the land, with the structures also, must be paid.[5] Such improvements

[1] Evans *v.* Haefner, 29 Mo. 141; Montgomery R. R. *v.* Walton, 14 Ala. 207.

[2] Hueston *v.* Eaton R. R., 4 Ohio St. 685; Johnson *v.* Joliet R. R., 23 Ill. 202.

[3] Montgomery R. R. *v.* Walton, 14 Ala. 207.

[4] Ferris *v.* Ward, 9 Ill. 499.

[5] Matter of Long Island R. R., 6 N. Y. Sup. Ct. 298; Graham *v.* Connersville, 86 Ind. 463; Hibbs *v.* Chicago R. R., 39 Iowa, 340. In United States *v.*

cannot be said to be made in good faith.[1] A purchase of the equity of redemption of a mortgageor in possession, and an entry thereunder, would give the corporation the right to the improvements, so that it would not be compelled to answer for the value of the improvements on a subsequent foreclosure of the mortgagee and condemnation of his interest.[2] An entry made after condemnation proceedings have been commenced, which were afterward abandoned, is of such a nature that the company, on a new condemnation, would not be compelled to pay for the value of the structure put upon the land at the time of the former entry.[3] If the owner knew that the improvements were being made, and remained wilfully passive, equity will not allow him to profit by the mistake, but will give him the value of the land, but not of the improvements.[4] In a recent case in Wisconsin, the court enunciates the following rule: "Where the company has built its road over the land of another, without authority, and proceedings are afterward taken to condemn the land, the measure of the appraisement is the value which the land taken would now have if the road had not been constructed upon it, together with the difference between the present value of the owner's contiguous land with the road where it is, and what would have been its present value if the road had not been built; and in determining the damages under the above rule, the condition and value of the land as it was just before the road was constructed may be considered as evidence."[5] The same question arose in Pennsylvania, in the case of Justice *v.* Nesquehoning Valley Railroad Company,[6] and Agnew, J.,

Tract of Land, 47 Cal. 515, the government was compelled to pay, in addition to the value of the land, the value of a light-house erected on an entry without condemnation.

[1] Graham *v.* Connersville R. R., 36 Ind. 463.

[2] Kennedy *v.* Milwaukee R. R., 22 Wis. 581.

[3] California Pacific R. R. *v.* Armstrong, 46 Cal. 85.

[4] Emerson *v.* Western R. R., 75 Ill. 176.

[5] Lyon *v.* G. B. & M. R. R., 42 Wis. 538.

[6] Reported in 18 Alb. L. J. 171.

enunciated the following doctrine: "This is not a case of mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter and to place these materials on the land taken for a public use, — materials essential to the very purpose which the state has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation, or to give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then, why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser, the owner of the land may take and keep his structures *nolens volens;* but not so in this case, for though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land, and, consequently, to reclaim, and avail itself of the structures laid thereon."

The English Lands Clauses Consolidation Act provides that the company shall not be disturbed in its possession by claimants setting up title to lands, when the company, by mistake or inadvertence, have omitted to purchase such interests. The interests, when discovered, must be promptly purchased; but the improvements would not belong to the claimants, but they should be compensated for their interest at the time of the taking. The company must show that through a mistake or inadvertence they had failed to pay compensation for the interest.[1]

[1] Hyde *v.* Mayor of Manchester, 5 De G. & Sm. 249; Martin *v.* London, etc., Rail Co., L. R. 1 Eq. 145; 35 L. J. (Ch.) 795; 8 & 9 Vict., c. 18, § 125.

CHAPTER XV.

OF BENEFITS AS AN ELEMENT OF COMPENSATION.

§ 149. Power to deduct benefits from compensation.
150. Classes of benefits.
151. Payment in benefits.
152. Benefits allowed in reduction of damages must be direct and peculiar.
153. General benefits not to be considered.
154. Benefit to railroad of establishment of a highway.
155. From what time shall benefits be calculated.
156. Privilege of giving up entire lot and escaping assessment.
157. Where use of property is limited — Increase of business — *Expert testimony.*
158. Setting off benefits against disadvantages.

§ 149. **Power to deduct benefits from compensation.** — This power must properly be considered as belonging to that of eminent domain, rather than to that of the taxing power.[1] When no property is actually taken from the subject, and he is called upon to contribute his share of the expense of a public improvement, the call made upon him is properly a tax.[2] When property is taken, and there is deducted from the value of the property taken, and of the incidental damages suffered, the benefits to the land remaining, that must be considered as a step in the process of arriving at the just compensation required to be made when

[1] Cooley, in Constitutional Limitations, 569, considers the opinion of Leonard, J., in Newby *v.* Platte County, 25 Mo. 258, to the point that the right to assess benefits should be referred to the taxing power, as unnecessary, and indeed somewhat difficult on principle. The assessment of benefits has been considered as taxation, when set off against incidental damages. Holton *v.* Milwaukee, 31 Wis. 27.

[2] Garrett *v.* St. Louis, 25 Mo. 505; Palmyra *v.* Morton, 25 Mo. 593; Striker *v.* Kelly, 7 Hill, 9; Astor *v.* Mayor of New York, 5 Jones & Sp. 589.

property is taken by the exercise of eminent domain.[1] Constitutions do not generally provide that the value of the land shall be paid, but that just compensation shall be paid, — just as regards the public as well as the individual.[2] The taxation of benefits does not affect the indemnity. It often happens that one may by taxation pay a certain portion of a claim he may have against the state,[3] and it is proper to settle the mutual accounts of the public and the owner in one transaction.[4] The legislature cannot fix the amount of benefits. That is to be arrived at by a judicial proceeding similar to that used in ascertaining damages.[5] Of later years the tendency has been to define by constitutional and legislative enactments the limitations to which benefits may be set off in reduction of damages, and generally with the result that benefits shall not be allowed to be set off against the value of the land taken.[6] The Illinois

[1] Nichols *v.* Bridgeport, 28 Conn. 189; Trinity College *v.* Hartford, 32 Conn. 452; Root's Case, 77 Pa. 276; The State *v.* Graves, 19 Md. 351; James River Co. *v.* Turner, 9 Leigh, 313; Page *v.* Chicago R. R., 70 Ill. 324; Peoria *v.* Kidder, 26 Ill. 351; San Francisco R. R. *v.* Caldwell, 31 Cal. 367; California Pacific R. R. *v.* Armstrong, 46 Cal. 85.

[2] Chesapeake Canal Co. *v.* Key, 3 Cranch C. Ct. 599; Betts *v.* Williamsburgh, 15 Barb. 255; San Francisco R. R. *v.* Caldwell, 31 Cal. 367.

[3] Dorgan *v.* Boston, 12 Allen, 223.

[4] Dorrance St., 4 R. I. 280; Loweree *v.* Newark, 38 N. J. L. 151; McMasters *v.* The Commonwealth, 3 Watts, 292; Whiteman's Executors *v.* Wilmington R. R., 2 Harr. 514.

[5] Carson *v.* Coleman, 11 N. J. Eq. 106. An assessment of the entire expense of an improvement upon land benefited would be unconstitutional if the expense was greater than the actual benefit to the land. Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518; *s. c.* 18 N. J. Eq. 54.

[6] Const. Texas, art. I., § 14; Paris *v.* Mason, 37 Texas, 447; Buffalo R. R. *v.* Ferris, 26 Texas, 588; Const. Ark., art. V., § 48; Whitehead *v.* Arkansas R. R., 28 Ark. 460; Elizabethtown R. R. *v.* Helm, 8 Bush, 681; Henderson R. R. *v.* Dickerson, 17 B. Mon. 173; Jacob *v.* Louisville, 9 Dana, 114; Sutton's Heirs *v.* Louisville, 5 Dana, 28; Grand Rapids R. R. *v.* Horn, 41 Ind. 479; Whitewater R. R. *v.* McClure, 29 Ind. 536; McMahon *v.* Cincinnati R. R., 5 Ind. 413 (earlier Indiana doctrine in McIntire *v.* The State, 5 Blackf. 384); Wilson *v.* Rockford R. R., 59 Ill. 273; Hayes *v.* Ottawa R. R., 54 Ill. 373; Alabama R. R. *v.* Burkett, 42 Ala. 83.

Constitution of 1870, art. II., sec. 13, and the Missouri Constitution of 1875, art. II., sec. 21, provide that private property shall not be taken or damaged without just compensation, and this section has been held to exclude the set-off of all benefits and advantages.[1] This proceeds on the doctrine that, in the absence of the constitutional provision, benefits may properly be set off against disadvantages, but that when payment for damages is required by the constitution, benefits cannot be set off against the damages. Payment must exclude the idea of set-off. The Constitution of Kansas provides, in art. XII., sec. 4, that compensation, irrespective of benefits, shall be made for rights of way taken for corporations. This is held to leave the common rule of setting off benefits against damages in opening highways still in force.[2] Although there may not, under the late constitutions, be a setting-off of benefits against the damages, there still may be a tax assessed locally on the property of the owner remaining, as well as on all other property in that locality, to pay for the improvements; and such taxation is not an evasion of the constitutional provision prohibiting benefits, the taxation being uniform.[3]

§ 150. **Classes of benefits.** — The Supreme Court of Massachusetts divides benefits into three kinds: 1. Those directly occasioned to the estate bounded on the highway, and peculiar to the estate itself, as distinguished from other estates not bounded thereon. 2. Those shared by the estate in common with other estates in the neighborhood. 3. Those which extend to all estates in the same town or city. The first class is properly subject to set-offs in the taking of

[1] Carpenter *v.* Jennings, 77 Ill. 250. Even direct and peculiar advantages. Frederick *v.* Shane, 32 Iowa, 254.

[2] Commissioners *v.* O'Sullivan, 17 Kan. 58.

[3] Cleveland *v.* Wick, 18 Ohio St. 303. Under the earlier Constitutions of Ohio, benefits were set off against damages. Brown *v.* Cincinnati, 14 Ohio, 541; Symonds *v.* Cincinnati, 14 Ohio, 147.

property; the second is of a nature to be assessed under betterment acts; and the third, subject to no claim from the owner.[1]

§ 151. **Payment in benefits.** — An entire payment of damages may be made in benefits.[2] When no damages are suffered over the local and peculiar benefit, the owner has already been compensated,[3] and direct benefits are to be set off against the general as well as the special damages to the remaining land.[4] When only an easement is taken, it is proper to consider benefits, although the constitution should require the payment of an equivalent in money. That would mean an equivalent in money for the amount not covered by the benefits. An easement does not take away the entire beneficial enjoyment of the land, while condemnation for some purposes does divest the owner from all beneficial enjoyment of his land.[5] Some of the courts consider the doctrine well settled, but manifest a reluctance to the perpetuation of it, and rely on the ground of *stare decisis*, while they indicate that a payment in benefits is not the just compensation intended by the Constitution.[6]

As we have seen in section 149, there are some states which deny the doctrine that there can be a payment in benefits for the value of the land taken, but that such payment must be in money.[7] It is considered unjust that the owner can

[1] Upham *v.* Worcester, 118 Mass. 97.

[2] Whitman *v.* Boston R. R., 8 Allen, 133; The Commonwealth *v.* Middlesex, 9 Mass. 388; Livingston *v.* Mayor of New York, 8 Wend. 85; Page *v.* Chicago R. R., 70 Ill. 324; Elgin *v.* Eaton, 88 Ill. 535; Putnam *v.* Douglas County, 6 Oreg. 328.

[3] Nichols *v.* Bridgeport, 23 Conn. 189; Trinity College *v.* Hartford, 32 Conn. 452; Chicago R. R. *v.* Francis, 70 Ill. 238; Long Island R. R. *v.* Bennett, 17 N. Y. Sup. Ct. 91.

[4] Winona R. R. *v.* Waldron, 11 Minn. 515.

[5] Livermore *v.* Jamaica, 23 Vt. 361.

[6] The State *v.* St. Louis, 62 Mo. 244.

[7] Isom *v.* Mississippi R. R., 36 Miss. 300; Penrice *v.* Wallis, 37 Miss. 172; Brown *v.* Beatty, 34 Miss. 227; Woodfolk *v.* Nashville R. R., 2 Swan, 422; Elizabethtown R. R. *v.* Helm, 8 Bush, 681; Sutton's Heirs *v.* Louisville, 5

be thus compelled to dispose of the land he desires to keep,[1] or have his damages reduced by the imaginary projection of a railroad in space, before any improvement is made.[2]

§ 152. **Benefits allowed in reduction of damages must be direct and peculiar.** — The general benefit accruing to the remainder of land not taken, in common with other land which is enhanced in value by the construction of the improvement, cannot be allowed in reduction of damages for land taken. The benefits must be direct and peculiar, resulting to the land in particular.[3] The fact that the road gave the owner of land convenient access to his forests, or lands at some distance, is a general benefit, as also the additional facility of taking produce to market.[4] Advantages of more convenient access to one's lot in town, and of making the lot a corner-lot, or of making it front on a more desirable avenue, or of increasing the front of the lot, are direct and peculiar benefits.[5] The benefit of the improvement of other property, at a distance from the tract through which the improvement passes, is a benefit too general in its character.[6] It is a direct benefit that a proposed improvement will discontinue a portion of an old road, which might then be taken possession of by the owner adjoining.[7]

Dana, 28; Robbins *v.* Milwaukee R. R., 6 Wis. 636; Bland *v.* Hixenbaugh, 89 Iowa, 582.

[1] Sutton's Heirs *v.* Louisville, 5 Dana, 28.

[2] Isom *v.* Mississippi R. R., 36 Miss. 300.

[3] Hosher *v.* Kansas City R. R., 60 Mo. 329; Quincy R. R. *v.* Ridge, 57 Mo. 599; James River Co. *v.* Turner, 9 Leigh, 313; Railroad Co. *v.* Tyree, 7 W. Va. 693; Mississippi River Bridge *v.* Ring, 58 Mo. 491; Pacific R. R. *v.* Chrystal, 25 Mo. 544; Newby *v.* Platte County, 25 Mo. 258; St. Louis R. R. *v.* Richardson, 45 Mo. 466; Lee *v.* Tebo R. R., 53 Mo. 178; Whitman *v.* Boston R. R., 7 Allen, 313; Meacham *v.* Fitchburg R. R., 4 Cush. 291; Freedle *v.* North Carolina R. R., 4 Jones L. 89; Weir *v.* St. Paul R. R., 18 Minn. 155.

[4] Adden *v.* White Mountains R. R., 55 N. H. 413; Whitcher *v.* Benton, 50 N. H. 25; Carpenter *v.* Landaff, 42 N. H. 218.

[5] Allen *v.* Charlestown, 109 Mass. 243; Whitney *v.* Boston, 98 Mass. 312; Farwell *v.* Cambridge, 11 Gray, 413; Milwaukee R. R. *v.* Eble, 4 Chand. 72.

[6] Railroad Co. *v.* Gilson, 8 Watts, 243.

[7] Tingley *v.* Providence, 8 R. I. 493.

Although land may be left in narrow strips which could not be used, yet if their value was increased if they could be added, by purchase or sale, to the land of adjoining owners, the benefit may be considered. Nothing is to prevent a purchase or sale when both owners would be benefited by the operation.[1] Benefits cannot be allowed for the construction of a railroad when another railroad was already on the same land.[2] If a lot is drained or fertilized by a public improvement, the benefit would be considered to be a direct one.[3] The direct and peculiar benefits can always be set off against the disadvantages occasioned by an improvement,[4] although an objection is entertained against setting them off against the value of the land taken.

§ 153. **General benefits not to be considered.** — A railroad or highway benefits the entire community, and the entire community should pay for it. If the improvement is partly for private advantage, the general benefit should not be collected from one and not from another. To deduct a general benefit from the damages suffered by the taking of land would be unjust, unless the general benefit should also be collected from those whose lands are not taken. Hence the owners of land taken cannot be charged with general benefits.[5] The increase in value of the remaining property is not conclusive as a benefit, for the owner may show that

[1] Terry *v.* Hartford, 39 Conn. 286.

[2] Tonica R. R. *v.* Unsicker, 22 Ill. 221.

[3] Milwaukee R. R. *v.* Eble, 4 Chand. 72.

[4] Hornstein *v.* Atlantic R. R., 51 Pa. 87; Harvey *v.* Lackawanna R. R., 47 Pa. 428.

[5] Carpenter *v.* Landaff, 42 N. H. 218; Sexton *v.* New Bridgewater, 116 Mass. 200; Water Commissioners *v.* Lawrence, 8 Edw. Ch. 552; Freedle *v.* North Carolina R. R., 4 Jones L. 89; Commissioners *v.* Johnston, 71 N. C. 398; Vicksburg R. R. *v.* Calderwood, 15 La. An. 481; The State *v.* Evans, 3 Ill. 208; Milwaukee R. R. *v.* Eble, 4 Chand. 72; Carli *v.* Stillwater R. R., 16 Minn. 260; Winona R. R. *v.* Waldron, 11 Minn. 515; Senior *v.* Metropolitan Rail. Co., 32 L. J. (Exch.) 225; Parks *v.* Hampden, 120 Mass. 895; Shawneetown *v.* Mason, 82 Ill. 337; Keithsburg R. R. *v.* Henry, 79 Ill. 290.

he made the improvements himself.[1] The benefit not allowed is that which comes from the common advantages and convenience of increased facilities, and the general advance in the value of real estate.[2] The benefit which accrues to land separated from that over which the improvement passes is general. The benefit must be confined to that particular tract,[3] and cannot include benefits to other lots of owner, detached,[4] or other blocks than those through which the road runs, although adjoining blocks.[5] The fact that the owner of land had made large profits by selling wood and ties to the railroad is not a peculiar, but a general, benefit. Any one else might have made the same profit.[6] The removal of a cemetery, caused by running a railroad through it, although a benefit to adjoining lands, cannot be considered a direct, but rather a general, benefit to the adjoining owners.[7]

§ 154. **Benefit to railroad of establishment of a highway.** — The benefit, to a railroad, of the establishment of a highway across it is too remote to be considered.[8] The increase of business is general, and evidence that fewer accidents will happen at the new highway, on account of the safer crossing, is too remote, although the former crossing was dangerous, and the company had been put to expense in paying for accidents.[9] In New York, the benefits of a

[1] Barker *v.* Taunton, 119 Mass. 392.

[2] Allen *v.* Charlestown, 109 Mass. 243; Whitman *v.* Boston R. R., 7 Allen, 313; James River Co. *v.* Turner, 9 Leigh, 313; Railroad Co. *v.* Tyree, 7 W. Va. 698; Memphis *v.* Bolton, 9 Heisk. 508.

[3] Meacham *v.* Fitchburg R. R., 4 Cush. 291; St. Louis R. R. *v.* Brown, 58 Ill. 61; Harrisburg R. R. *v.* Moore (Sup. Ct. Pa.), 4 W. N. 532.

[4] The State *v.* Digby, 5 Blackf. 543. The later doctrine in Indiana rejects benefits altogether.

[5] Todd *v.* Kankakee R. R., 78 Ill. 530.

[6] Minnesota Valley R. R. *v.* Doran, 17 Minn. 188.

[7] Minnesota R. R. *v.* McNamara, 13 Minn. 508.

[8] Bridgeport *v.* New York R. R., 36 Conn. 255.

[9] Boston R. R. *v.* Middlesex, 1 Allen, 324; Old Colony R. R. *v.* Plymouth, 14 Gray, 155.

street improvement may be charged against a railroad company, and be assessed against the track, the property benefited. The fact that no one might wish to purchase a portion of a railroad track is no argument against the right to sell.[1]

§ 155. **From what time shall benefits be calculated.** — Following the analogy of damages, benefits should be considered as of the time of taking, as benefits are deducted from damages in order to find the just compensation. However, if the benefit is one arising after the taking, as the construction of a depot near the ground, or, on the contrary, the refusal to construct a depot according to stipulation, the matter may be considered according to the condition of affairs at the time of the trial.[2]

§ 156. **Privilege of giving up entire lot and escaping assessment.** — To obviate the seeming injustice and frequent hardships of assessment of benefits on remaining lands, statutes have been passed allowing the owner to give up his whole lot, and receive the value in money, rather than to keep the remainder charged with the assessment.[3] This cannot be done against the will of the owner, as the excess over the needs of the public would be taken for a use not public; but it is proper to give the election to the owner, whether or not he should keep the remainder, or allow the public to take it at a valuation.[4]

§ 157. **Where use of property is limited — Increase of business — Expert testimony.** — Land devoted to a particular use, such as a church, cemetery, or water-works, and which cannot be changed from that use, should not be

[1] Troy R. R. *v.* Kane, 16 N. Y. Sup. Ct. 506.
[2] Hayes *v.* Ottawa R. R., 54 Ill. 373.
[3] Dorgan *v.* Boston, 12 Allen, 223.
[4] Baltimore *v.* Clunet, 23 Md. 449; Dunn *v.* Charleston, Harp. 189.

charged with benefits as property open to sale for general purposes.[1]

As no damages will be allowed on account of diversion of business, caused by a public improvement, the converse is also true, and no benefit will be allowed on account of increase of business, occasioned by the improvement.[2]

Expert testimony is admissible to show the benefits to an estate by a public improvement. A witness may be asked the increased value per foot of a lot on a street as wide as the one proposed.[3]

§ 158. **Setting off benefits against disadvantages.** — The fairest rule in dealing with benefits and disadvantages is to set off the benefits against the disadvantages only, allowing the owner to recover any excess of disadvantages over benefits, but not allowing the excess of benefits to reduce the claim for the actual value of the land and materials taken. This is the doctrine of many of the states.[4] This doctrine is generally the result of legislation to that end.[5] If the jury should find no damages, it would be presumed that they had set off benefits against the value of lands, and hence their reports would be quashed.[6] The doctrine is denied in Mississippi, on the general principle of rejecting all benefits.[7] The doctrine is upheld in Tennessee,

[1] Owners *v.* Mayor of Albany, 15 Wend. 374.

[2] Brown *v.* Providence R. R., 5 Gray, 35.

[3] Shaw *v.* Charlestown, 2 Gray, 107.

[4] Shipley *v.* Baltimore R. R., 34 Md. 336; Mitchell *v.* Thornton, 21 Gratt. 164; Railroad Co. *v.* Tyree, 7 W. Va. 693; Raleigh R. R. *v.* Wicker, 74 N. C. 220; Mayor *v.* Central R. R., 53 Ga. 120; Jones *v.* Wills Valley R. R., 30 Ga. 43; Newcastle R. R. *v.* Brumback, 5 Ind. 543; Todd *v.* Kankakee R. R., 78 Ill. 530; Wagner *v.* Gage County, 3 Neb. 237; Sutton's Heirs *v.* Louisville, 5 Dana, 28; Robinson *v.* Robinson, 1 Duv. 162; Louisville R. R. *v.* Glazebrook, 1 Bush, 325; Buffalo R. R. *v.* Ferris, 26 Texas, 588; New Orleans R. R. *v.* Lagarde, 10 La. An. 150; Vicksburg R. R. *v.* Calderwood, 15 La. An. 481; Memphis *v.* Bolton, 9 Heisk. 508.

[5] Augusta *v.* Marks, 50 Ga. 612; Young *v.* Harrison, 17 Ga. 30; Elizabethtown R. R. *v.* Helm, 8 Bush, 681; Hayes *v.* Ottawa R. R., 54 Ill. 373.

[6] Mitchell *v.* Thornton, 21 Gratt. 164.

[7] Isom *v.* Mississippi R. R., 36 Miss. 300.

as a proper construction of "just compensation."[1] In Kentucky, the incidental damages for separating a part from the remainder must be paid in money, and benefits cannot be set off against such damages,[2] but they may be set off against consequential damages.[3]

[1] Woodfolk *v.* Nashville R. R., 2 Swan, 422.

[2] Elizabethtown R. R. *v.* Helm, 8 Bush, 681; Louisville R. R. *v.* Glazebrook, 1 Bush, 325 (qualifying Jacob *v.* Louisville, 9 Dana, 114).

[3] Henderson R. R. *v.* Dickerson, 17 B. Mon. 178. Same doctrine, Chapman *v.* Oshkosh R. R., 33 Wis. 629.

CHAPTER XVI.

OF THE NATURE AND AMOUNT OF DAMAGES.

§ 159. Adequacy of damages.
160. Title a proper subject of inquiry in determining damages.
161. Condemning party cannot dispute title.
162. Direct damages — Disadvantages.
163. Exposure to fire.
164. Jury or commissioners to determine the damages.
165. Testimony as to the amount of damages.
166. Effect of taking a part on the land left.
167. Damage to tract — Extent of tract — Separate blocks.
168. Market value.
169. Expert witnesses.
170. Sales of similar property.
171. Rents of similar property.
172. Evidence of assessment for taxation — Of commissioners' report — Admissions of owner.
173. Value not estimated solely from present use.
174. Assessment should be of the value at the time of taking.
175. Interest on award.
176. Interference with the use before taking.
177. Interference with use during construction — Loss of profits.
178. On a taking subsequent to the improvement.
179. Taking part of a railroad.
180. Plan of proposed improvement.

§ 159. **Adequacy of damages.** — Damage, when arising from an exercise of eminent domain, is an actual diminution in present value or of price of property, caused by construction of a public improvement; or a physical injury to the property, that renders it less valuable in the market if offered for sale[1] or for rent.[2] Hence the value of premises as a building must be given, and not of the materials only.[3] The

[1] Chicago R. R. v. Francis, 70 Ill. 238; Snyder v. Western R. R., 25 Wis. 60.
[2] St. Louis R. R. v. Capps, 67 Ill. 607.
[3] Lafayette R. R. v. Winslow, 66 Ill. 219.

compensation for the damages should not be restricted to the actual value of the land taken, nor to the depreciation in value caused by the separation of the piece from the whole, but to the difference in value of the property before and after the improvement,[1] and should not include any prospective damages.[2] The cost of replacing erections or improvements elsewhere is not the measure of damages, but the difference in value before and after the taking is complete.[3] The expense of removing personal property from the premises is not to be included.[4] It is not proper to consider the difference in value between the land with the railroad on it, and with the railroad running near, but not on it, as owners near are not compelled to account for benefits.[5] Where a railroad used a part of a wall made to protect land from washing, and the wall still answered the purpose, the damage would not be what the wall cost, but what would make the owner whole.[6] The question of the adequacy of the damages allowed is generally one for the viewers or the jury, and not for the appellate court, except where the error is of such a gross nature that the court would, if the matter were an ordinary suit at law, set aside the finding as against the evidence.[7] Some of the states,

[1] San Francisco R. R. v. Caldwell, 31 Cal. 367; Matter of Utica R. R., 56 Barb. 456; Rochester R. R. v. Budlong, 12 N. Y. Leg. Obs. 46; Bangor R. R. v. McComb, 60 Me. 290; Pennsylvania R. R. v. Bunnell, 81 Pa. 414; Shenango R. R. v. Braham, 79 Pa. 447; East Pennsylvania R. R. v. Hottenstine, 47 Pa. 28; Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362; Schuylkill Co. v. Thoburn, 7 Serg. & R. 411; Tide-Water Co. v. Archer, 9 Gill & J. 479; Selma R. R. v. Keith, 53 Ga. 178; Sidener v. Essex, 22 Ind. 201; Chicago R. R. v. Stein, 75 Ill. 41; Eberhart v. Chicago R. R., 70 Ill. 347; Bigelow v. Wisconsin R. R., 27 Wis. 478; Gear v. Railroad, 39 Iowa, 23; Brooks v. Davenport R. R., 37 Iowa, 99; Harrison v. Iowa R. R., 36 Iowa, 323; Simmons v. St. Paul R. R., 18 Minn. 184; Virginia R. R. v. Henry, 8 Nev. 165; Cummings v. Williamsport, 84 Pa. 473; Putnam v. Douglas County, 6 Oreg. 328.

[2] Canandaigua R. R. v. Payne, 16 Barb. 273; Brooks v. Davenport R. R., 37 Iowa, 99.

[3] Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362.

[4] Central Pacific R. R. v. Pearson, 35 Cal. 247.

[5] Carli v. Stillwater R. R., 16 Minn. 260.

[6] Gear v. Railroad, 39 Iowa, 23.

[7] Hannibal R. R. v. Morton, 27 Mo. 317.

as we have seen in the chapter just preceding, do not consider the damages adequate unless all benefits are excluded,[1] and declare the rule set forth in the cases cited in note 4 to substantially allow benefits to be set off against damages.[2]

§ 160. **Title a proper subject of inquiry in determining damages.** — The damages paid must be according to the estate taken, and hence it is proper to show that the damages are nominal, because the estate was of nominal value.[3] If the claimant does not own the land, he will not be entitled to damages for its taking. Although commissioners or juries to assess damages are not the proper tribunals for passing upon title to land, yet the title must be taken into consideration in estimating the damages.[4] Evidence of the claimant's title is admissible to show that no damages have been suffered.[5] In the absence of exceptions, it will be presumed that the jury found correctly as to the title.[6] The damage to the estate may properly be estimated, and, in a suit by the claimant to compel payment, the title may be tried. A deed may be offered in evidence to show the title,[7] and such evidence is relevant and material to the issue.[8] The question of title cannot be conclusively settled by the commissioners, as to whether or not the land belongs to individuals or the public.[9] But the commissioners may report

[1] Harrison v. Iowa R. R., 36 Iowa, 323; Henry v. Dubuque R. R., 2 Iowa, 288; Sater v. Burlington R. R., 1 Iowa, 336; Elizabethtown R. R. v. Helm, 8 Bush, 681.

[2] Atchison R. R. v. Blackshire, 10 Kan. 477; San Francisco R. R. v. Caldwell, 31 Cal. 367.

[3] Miller v. Mayor of Newark, 35 N. J. L. 460.

[4] Thurston v. Portland, 63 Me. 149; Anthony v. Lawhorne, 1 Leigh, 1; Jones v. Barclay, 2 J. J. Marsh. 78.

[5] Minot v. Cumberland Commissioners, 28 Me. 121.

[6] Directors v. Railroad, 7 Watts & S. 236; Horrocks v. Metropolitan Rail. Co., 4 B. & S. 315; Regina v. London Rail. Co., 3 El. & Bl. 443.

[7] Anthony v. Lawhorne, 1 Leigh, 1; Mansfield R. R. v. Clark, 23 Mich. 519; Mortimer v. South Wales Rail. Co., 28 L. J. (Q. B.) 129; Read v. Victoria Rail. Co., 1 N. R. 446; 32 L. J. (Ex.) 167.

[8] Carli v. Stillwater R. R., 16 Minn. 260.

[9] Wilcox v. Oakland, 49 Cal. 29.

in favor of the particular claimant they consider entitled to damages, although their opinion is not conclusive. In such cases, the damages would be paid into court, for the benefit of whomsoever the court may adjudge to be entitled to the same.[1] In the petition, the title need not be set forth with exactness, as the damages are to be paid according to the title at the hearing.[2] In case the condemning party, in its petition, fails to state the title of owners or claimants correctly, the owner is not thereby concluded from asserting and proving his real claim. Whenever, therefore, either by an indefinite statement in the petition as to the interest of the claimant in the property, or by one not accepted by him as true before the commissioners, it becomes necessary for them to inquire into and decide the question of title or interest as incidental to the question of damages, it is proper matter for their consideration, and their decision on that matter is reviewable in the appellate court.[3]

§ 161. **Condemning party cannot dispute title.** — The condemning party cannot dispute the title of the party in possession, against whom proceedings have been instituted,[4] unless such party has acquired a paramount title. The condemning party cannot raise the question of transfers void as to creditors, or void on any other ground.[5] The owner need not offer evidence of his title on the trial,[6] or on appeal.[7] In considering damages to land not taken, there

[1] Lefevre's Appeal, 32 Cal. 565; San Francisco R. R. v. Mahoney, 29 Cal. 112; Spring Valley Water-Works v. San Francisco, 22 Cal. 434.

[2] Grand Junction R. R. v. Middlesex, 14 Gray, 558.

[3] Brisbine v. St. Paul R. R., 23 Minn. 114.

[4] Selma R. R. v. Camp, 45 Ga. 180; Auditor v. Crise, 20 Ark. 540; Crise v. Auditor, 17 Ark. 572; Norristown Turnpike v. Burket, 26 Ind. 53; St. Louis R. R. v. Teters, 68 Ill. 144; Peoria R. R. v. Laurie, 63 Ill. 264; Peoria R. R. v. Bryant, 57 Ill. 473; President v. Givens, 17 Ill. 255; St. Paul R. R. v. Matthews 16 Minn. 341.

[5] La Crosse R. R. v. Seeger, 4 Wis. 268.

[6] Selma R. R. v. Camp, 45 Ga. 180.

[7] Knauft v. St. Paul R. R., 22 Minn. 178. The company cannot, on appeal, dispute the title of the owner, where the proceedings were instituted by the company on a petition setting forth the claimant as the owner, and describing

is no presumption as to the title, and the owner should show his title.[1] A resolution of a city council appropriating compensation to a party is an admission of the right of the party in the land appropriated.[2] If there is a defect in the title of the owner proceeded against, the remedy of the company is to have the inquest set aside,[3] or to dismiss the proceedings already brought.[4] The case is different where the owner institutes the proceedings.[5] In such case, he must show a title more than sufficient to maintain trespass,[6] and the condemning party should set up his failure of title, or the rights of others in the proceedings, by answer.[7]

§ 162. **Direct damages — Disadvantages.** — In estimating damages for the taking of land, the award must be restricted to the direct damages to the lot. No damages which affect the individual and the community generally are admissible.[8]

In securing to the owner just compensation, there should be given, in addition to the actual value of the land taken, a further indemnity for damages resulting from the use to which the land taken is to be applied.[9] The danger from the use of land as a railroad is greater than that from its use as a highway, and the inconvenience of each is to be considered.[10] Disadvantages would include he impairment of

the property as his. On appeal, this question of title should not arise unless it was also litigated below. Rippe *v.* Chicago R. R., 23 Minn. 18.

[1] St. Paul R. R. *v.* Matthews, 16 Minn. 341.

[2] Mayor *v.* Richardson, 1 Stew. & P. 12.

[3] Auditor *v.* Crise, 20 Ark. 540.

[4] Peoria R. R. *v.* Laurie, 63 Ill. 264; Wright *v.* Wisconsin R. R., 29 Wis. 341.

[5] Peoria R. R. *v.* Bryant, 57 Ill. 473.

[6] Robbins *v.* Milwaukee R. R., 6 Wis. 636.

[7] Daley *v.* St. Paul, 7 Minn. 390.

[8] Bangor R. R. *v.* McComb, 60 Me. 290. No personal injury or inconvenience not connected with lands, etc., can be the subject of compensation. Bird *v.* Great Eastern Rail. Co., 34 L. J. (C. P.) 866; Rickets *v.* Metropolitan Rail. Co., 34 L. J. (Q. B.) 257.

[9] Newby *v.* Platte County, 25 Mo. 258; White *v.* Charlotte R. R., 6 Rich. L. 47; Young *v.* Harrison, 17 Ga. 30.

[10] Curtis *v.* St. Paul R. R., 20 Minn. 28.

the value of the property remaining, on account of the removal of a part;[1] the bringing of owners' buildings into proximity to a railroad; the inconveniences from the sounding of whistles, ringing of bells, rattling of trains, and jarring of ground;[2] inconveniences from new fences or ditches,[3] from embankments,[4] or cuts,[5] or leaking from a canal,[6] or liability of stock to be killed,[7] or family to be injured;[8] inconvenience in opening gates and bars,[9] and crossing from one part of an establishment to another, over a railroad track.[10]

§ 163. **Exposure to fire.** — Among the damages occasioned by the location of a railroad on a portion of land is the exposure of the crops and buildings on the land to fire, from the sparks emitted from passing trains. The apprehension of fire is an element of damages, notwithstanding the railroad company may be compelled by law to answer all damages, whether resulting from negligence or not.[11] The owner may prudently insure, notwithstanding the liability of the company to pay damages. The adjacency of the road to the property is an increase of risk, and in-

[1] Pacific R. R. *v.* Chrystal, 25 Mo. 544; James River Co. *v.* Turner, 9 Leigh, 313; Raleigh R. R. *v.* Wicker, 74 N. C. 220; Eddings *v.* Seabrook, 12 Rich. L. 504; The State *v.* Evans, 8 Ill. 208.

[2] Bangor R. R. *v.* McComb, 60 Me. 290; White *v.* Charlotte R. R., 6 Rich. L. 47.

[3] Danville R. R. *v.* Gearhart, 32 Leg. Int. (Pa.) 219; Whitewater R. R. *v.* McClure, 29 Ind. 536.

[4] Pittsburg R. R. *v.* Rose, 74 Pa. 362.

[5] Atchison R. R. *v.* Blackshire, 10 Kan. 477.

[6] James River Co. *v.* Turner, 9 Leigh, 313.

[7] St. Louis R. R. *v.* Teters, 68 Ill. 144; Wilson *v.* Rockford R. R., 59 Ill. 273.

[8] Wilson *v.* Rockford R. R., 59 Ill. 273; Curtis *v.* St. Paul R. R., 20 Minn. 28.

[9] Minnesota R. R. *v.* Doran, 17 Minn. 188.

[10] Sherwood *v.* St. Paul R. R., 21 Minn. 122; Winona R. R. *v.* Waldron, 11 Minn. 515.

[11] Bangor R. R. *v.* McComb, 60 Me. 290; Pierce *v.* Worcester R. R., 105 Mass. 199; Somerville R. R. *v.* Doughty, 22 N. J. L. 495; Keithsburg R. R. *v.* Henry, 79 Ill. 290.

creases the cost of insurance. Increase of cost of insurance diminishes the value of the buildings. An action against a railroad company for damages caused by fire is a poor substitute for insurance. The owner may select his insurance company, but cannot select his railroad.[1] The present value of a building for purposes of residence or for sale is diminished by the effect of a constant liability to fire, on account of proximity to a railroad.[2] The danger, to be considered, must be real and imminent, and will not be considered when buildings are at some distance from the railroad.[3] If the danger is such as to render it advisable to remove the buildings, the cost of removal is a proper subject of damages.[4] A secretary of an insurance company can give an estimate of damages from the increase of a rate of insurance, and can also testify that his company had refused the risk on account of increased hazard.[5] In some states the doctrine is denied,[6] because of the uncertain and contingent nature of the damages,[7] and because the railroad would be responsible for fires caused by negligence.[8] Railroad companies are not responsible for accidental fires

[1] Adden *v.* White Mountains R. R., 55 N. H. 413. By the New Hampshire statute, the railroad company, on paying the loss, might be subrogated to the claim against the insurance company. The damages should be paid by the railroad company, because the owner, to be perfectly secure, is compelled to pay for insurance at an increased rate; and, for this increase in the rate, he should receive compensation from the railroad company. *In re* Stockport, etc., Rail. Co., 33 L. J. (Q. B.) 251.

[2] Pierce *v.* Worcester R. R., 105 Mass. 199; Matter of Utica R. R., 56 Barb. 456; Wilmington R. R. *v.* Stauffer, 60 Pa. 374; Colvill *v.* St. Paul R. R., 19 Minn. 283; Curtis *v.* St. Paul R. R., 20 Minn. 28; Oregon R. R. *v.* Barlow, 3 Oreg. 311.

[3] Jones *v.* Chicago R. R., 68 Ill. 380; St. Louis R. R. *v.* Teters, 68 Ill. 144; Hatch *v.* Cincinnati R. R., 19 Ohio St. 92.

[4] Oregon R. R. *v.* Barlow, 3 Oreg. 311.

[5] Webber *v.* Eastern R. R., 2 Metc. 147.

[6] Rodemacher *v.* Milwaukee R. R., 41 Iowa, 297.

[7] Lehigh Valley R. R. *v.* Lazarus, 28 Pa. 203; Sunbury R. R. *v.* Hummell, 27 Pa. 99; Patten *v.* Northern Central R. R., 33 Pa. 426.

[8] Sunbury R. R. *v.* Hummell, 27 Pa. 99 (qualifying Philadelphia R. R. *v.* Yeiser, 8 Pa. 366).

unless guilty of some negligence, and it is not negligence to employ locomotive engines.[1]

§ 164. **Jury or commissioners to determine the damages.** — The only way to determine the damages is by an assessment by a jury or commissioners, and not otherwise.[2] Witnesses are to detail facts tending to prove inconvenience and injury, and from these facts, and not the opinions of witnesses, the jury are to ascertain the quantity of damages.[3] The jury are to harmonize the testimony, and where the testimony placed the damages at from $1,800 to $18,000, a finding of $5,500 will not be set aside.[4] The court cannot average the testimony of witnesses and endeavor to harmonize the conflict of testimony.[5]

§ 165. **Testimony as to the amount of damages.** — The general rule is, that witnesses shall not testify how much the property is damaged, or give their opinion as to the amount of damages. They may testify as to the value of property,[6] and as to the value of property before and after the improvement, but not as to the effect of the change in adding to or taking from such value.[7] The extent of damages is to be proved by facts, and estimated by the jury.[8] Hence a witness cannot be asked the value of the land with the strip taken out.[9] Notwithstanding the array of author-

[1] Vaughan R. R. *v.* Taff Valley Rail. Co., 29 L. J. (Exch.) 247.

[2] Barrickman *v.* Commissioners, 11 Gill & J. 50.

[3] Montgomery R. R. *v.* Varner, 19 Ala. 185.

[4] Peoria R. R. *v.* Birkett, 62 Ill. 332.

[5] Illinois R. R. *v.* Von Horn, 18 Ill. 257.

[6] Prosser *v.* Wapello County, 18 Iowa, 327.

[7] Dalzell *v.* Davenport, 12 Iowa, 437; Sater *v.* Burlington R. R., 1 Iowa, 386; Simmons *v.* St. Paul R. R., 18 Minn. 184; Curtis *v.* St. Paul R. R., 20 Minn. 28; Colvill *v.* St. Paul R. R., 19 Minn. 283; Atlantic R. R. *v.* Campbell, 14 Ohio St. 583; Tingley *v.* Providence, 8 R. I. 493; Hosher *v.* Kansas City R. R., 60 Mo. 329; Rockford R. R. *v.* McKinley, 64 Ill. 338.

[8] Evansville R. R. *v.* Fitzpatrick, 10 Ind. 120; Farrand *v.* Chicago R. R., 21 Wis. 435; Harrison *v.* Iowa R. R., 36 Iowa, 323; Alabama R. R. *v.* Burkett, 42 Ala. 83; Montgomery R. R. *v.* Varner, 19 Ala. 185.

[9] Logansport *v.* McMillen, 49 Ind. 493.

ities above cited, there seems to be a growing tendency to allow witnesses to give an opinion on the amount of damages.[1] It can hardly be seen how the jury can with any greater fairness arrive at the amount of damages by subtracting for themselves the present value from the former value, than by allowing a witness to do the same thing. A witness familiar with the facts may properly give an opinion of the damages.[2] The Supreme Court of Massachusetts, in Swan *v.* Middlesex,[3] allowed this question to be put to a witness: "What, in your opinion, would be the effect, upon the value of the estate in question, of widening the street and cutting off the land and trees?" although the witness had no actual knowledge of any similar case. This is not the same thing as asking what amount would induce him to have a street similarly widened in front of his own property. A witness may be asked how much the building of a road would diminish the value of the land, and how much less it would be worth with the railroad than without it.[4] He may give an estimate of the damages to an estate caused by the passing of engines within one hundred feet of a building, in diminishing the rent and increasing the rate of insurance.[5] Witnesses may give evidence as to the reasons why they think the land is depreciated in value.[6] The jury cannot always see the land, and witnesses cannot always describe the situation and condition of land so that a jury can determine damages. Hence they are permitted to state values before and after, and may be asked how much the residue is worth in consequence of the railroad crossing it as it did.[7]

[1] White Deer Creek Co. *v.* Sassaman, 67 Pa. 415; East Pennsylvania R. R. *v.* Hottenstine, 47 Pa. 28; Lehmicke *v.* St. Paul R. R., 19 Minn. 464.

[2] Stein *v.* Burden, 24 Ala. 130.

[3] 101 Mass. 173.

[4] Brainard *v.* Boston R. R., 12 Gray, 407; Pittsburgh R. R. *v.* Rose, 74 Pa. 362; Eberhart *v.* Chicago R. R., 70 Ill. 347.

[5] Webber *v.* Eastern R. R., 2 Metc. 147; Pittsburgh R. R. *v.* Rose, 74 Pa. 362.

[6] Parks *v.* Wisconsin R. R., 38 Wis. 413.

[7] Snyder *v.* Western R. R., 25 Wis. 60; Farrand *v.* Chicago R. R., 21 Wis. 435; St. Paul R. R. *v.* Murphy, 19 Minn. 500; Missouri R. R. *v.* Owen, 8 Kan. 409.

In a recent case in Illinois,[1] the court adopts the rule that witnesses who are acquainted with the farm, and its productiveness, and its value, may give their opinion as to the extent of damages which the construction of the road will occasion, leaving it to the jury to weigh such evidence as it deserves.

§ 166. **Effect of taking a part on the land left.** — When less than the whole is taken, there is to be considered how much the portion not taken is increased or diminished in value in consequence of the appropriation.[2] The valuation of the strip taken is of its value in relation to the whole, not its value as a strip alone.[3] To arrive at this, the jury may consider the damages by reason of the lot or building being severed or disfigured on account of the taking of the strip, and the use of it, and the effect of the proposed use of the strip upon the remainder of the lot;[4]

[1] Keithsburg R. R. *v.* Henry, 79 Ill. 290.

[2] Mississippi River Bridge *v.* Ring, 58 Mo. 491; First Church *v.* Boston, 14 Gray, 214; The Commonwealth *v.* Coombs, 2 Mass. 489; Bangor R. R. *v.* McComb, 60 Me. 290; Selma R. R. *v.* Redwine, 51 Ga. 420; Henderson R. R. *v.* Dickerson, 17 B. Mon. 173; Virginia R. R. *v.* Henry, 8 Nev. 165.

[3] Winona R. R. *v.* Denman, 10 Minn. 267; Bigelow *v.* Wisconsin R. R., 27 Wis. 478.

[4] Bangor R. R. *v.* McComb, 60 Me. 290; Mount Washington Road, 35 N. H. 134; Edmands *v.* Boston, 108 Mass. 535; Presbrey *v.* Old Colony R. R., 108 Mass. 1; Albany R. R. *v.* Lansing, 16 Barb. 68; Somerville R. R. *v.* Doughty, 22 N. J. L. 495; Watson *v.* Pittsburgh R. R., 37 Pa. 469; Raleigh R. R. *v.* Wicker, 74 N. C. 220; White *v.* Charlotte R. R., 6 Rich. L. 47; Richmond Turnpike *v.* Rogers, 1 Duv. 135; Baltimore R. R. *v.* Lansing, 52 Ind. 229; Whitewater R. R. *v.* McClure, 29 Ind. 536; Montmorency Road *v.* Stockton, 43 Ind. 328; Keithsburg R. R. *v.* Henry, 79 Ill. 290; Rockford R. R. *v.* McKinley, 64 Ill. 338; Tonica R. R. *v.* Unsicker, 22 Ill. 221; Parks *v.* Wisconsin R. R., 33 Wis. 413; Bigelow *v.* Wisconsin R. R., 27 Wis. 478; Brooks *v.* Davenport R. R., 37 Iowa, 99; Scott *v.* St. Paul R. R., 21 Minn. 322; Simmons *v.* St. Paul R. R., 18 Minn. 184; Hursh *v.* St. Paul R. R., 17 Minn. 439; Winona R. R. *v.* Waldron, 11 Minn. 515; St. Joseph R. R. *v.* Orr, 8 Kan. 419; Cleveland R. R. *v.* Ball, 5 Ohio St. 568; Cincinnati R. R. *v.* Longworth, 30 Ohio St. 108; Kucheman *v.* C. C. & D. R. R., 46 Iowa, 366. The use, for a canal, of the strip taken may render additional land belonging to the same tract unfit for cultivation by leakage through the banks. The measure of damages is not merely the value of the strip taken, but the difference in value of the whole

the fact that the improvement will separate a well, garden, or highway from the house, or change the grades of crossings to reach the parts separated,[1] or make the crossings more inconvenient,[2] or cut up the land inconveniently, so as to interfere with watering stock, or to interrupt the flow of surface water and water in the accustomed channels.[3] It is proper to ask a witness the value of the land before the taking, and the value of the remainder after the taking with the improvement thereon.[4] The effect must be on the remaining land. No damages will be allowed for frightening horses.[5] If a new road would obviate the inconvenience arising from cutting up land into inconvenient parcels, the cost of the new road and of maintaining it beyond that of the road formerly used would be a proper measure of damages.[6] The damages should be for the inconvenience; not what it would cost to build buildings on the other side of the track, which were separated by the track.[7] A stand used as a public-house may be greatly injured by the proximity of a railroad, and by cutting up the grounds.[8] In

tract before and after the taking, occasioned by the use to which the strip is put. Pennsylvania Canal *v.* Hill, 6 W. N. C., No. 14 (Pa).

[1] Dearborn *v.* Boston R. R., 24 N. H. 179; Albany R. R. *v.* Lansing, 16 Barb. 68; Readington *v.* Dilley, 24 N. J. L. 209; Somerville R. R. *v.* Doughty, 22 N. J. L. 495.

[2] East Pennsylvania R. R. *v.* Hiester, 40 Pa. 58; Patten *v.* Northern Central R. R., 33 Pa. 426; Baltimore R. R. *v.* Lansing, 52 Ind. 229; Robbins *v.* Milwaukee R. R., 6 Wis. 636. An inconvenience caused by a railroad company improperly allowing trains to obstruct a crossing is to be reached by an action as for a nuisance. Patten *v.* Northern Central R. R., 33 Pa. 426.

[3] Grand Rapids R. R. *v.* Horn, 41 Ind. 479; Rockford R. R. *v.* McKinley, 64 Ill. 338; Tonica R. R. *v.* Unsicker, 22 Ill. 221; Robbins *v.* Milwaukee R. R., 6 Wis. 636.

[4] Snow *v.* Boston R. R., 65 Me. 230; Matter of Utica R. R., 56 Barb. 456; Watson *v.* Pittsburgh R. R., 37 Pa. 469.

[5] Presbrey *v.* Old Colony R. R., 103 Mass. 1.

[6] *Ibid.* The English Railway Act provides for the compulsory construction of means of communication between the severed parts at the expense of the company, and hence such damages would not be allowed. South Wales Co. *v.* Richards, 6 Eng. Rail. Cas. 197.

[7] Carpenter *v.* Easton R. R., 24 N. J. Eq. 403.

[8] White *v.* Charlotte R. R., 6 Rich. L. 47.

a second condemnation of another portion of a tract through which a portion has been previously taken, the inconvenience from cutting a tract into inconvenient parcels will not justify the allowance of the same damages as on the first condemnation.[1]

§ 167. **Damage to tract — Extent of tract — Separate blocks.** — Ordinarily, the damages must be confined to the lot or subdivision from which the land is taken, and injury to other lots, separated by streets and alleys, is not generally taken into consideration. The damages and benefits should be considered in relation to the entire tract, and not to a limited strip immediately adjoining the railroad or improvement.[2] Damages to lands of same owner, at a considerable distance, caused by injuring a franchise out of such land, cannot be added to damages to land actually taken.[3] The damages to separate tracts are to be considered separately.[4] If, however, more than one lot or block is occupied in one business, as in that of a brewery, with necessary buildings on each side of an alley, the damages to the entire property must be paid, and not only the damages to the lot from which the strip of land is taken. But if the fixtures, engines, and appliances could be transferred to the other side of the alley, and placed in such a situation that the brewery could have been just as effectively operated as it was before, then the actual loss to the owners would have been the trouble and expense of making the removal, together with compensation for the use of the brewery for whatever time it would have been necessarily idle whilst the change and transfer were being made.[5] Again, if the several lots are used as one property, as a lumber-yard and saw-mill, and all the blocks were necessary to the enjoy-

[1] Lake Superior R. R. v. Greve, 17 Minn. 322.
[2] Page v. Chicago R. R., 70 Ill. 324; Robbins v. Milwaukee R. R., 6 Wis. 636.
[3] Fuller v. Edings, 11 Rich. L. 239.
[4] St. Louis R. R. v. Brown, 58 Ill. 61.
[5] Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582.

ment of the mill property, damages may be allowed to the whole tract, for taking away and separating necessary portions of the establishment, although the lots may be separated from each other by a public street.[1] The same doctrine has been applied to the case of a brick-yard, where the different lots were used together, and where the owners were prevented from enlarging by proximity to the railroad.[2] The fact that a tract had been laid out into city lots, but not used as such, will not prevent the consideration of the damages to the entire tract. The court is not to consider the map, but the land as it stands, and the use to which it is applicable. The division into lots is accidental.[3] Hence an eighty-acre tract, separated from the rest of a farm by a public road, may be considered as a part of the farm, if actually so in fact.[4] The tract is to be a compact tract, and not two farms separated by a high bluff and distant from each other, through only one of which the railroad passed.[5] When the blocks and tracts are not used together, no damages can be allowed for blocks separated by streets from the block in which the land is taken;[6] and if a strip is taken adjoining an existing railroad, there would be no damages for land on the other side of the existing railroad.[7] The question cannot arise in considering damages to vacant and unoccupied land.[8] Where the company institutes proceedings, and describes the land in its petition, the damages are to be confined to the land mentioned in the petition, unless the owner, by cross-bill, shows that he owns contiguous land

[1] Chapman v. Oshkosh R. R., 33 Wis. 629. *Contra* (in a case almost exactly similar), Fleming v. Chicago R. R., 34 Iowa, 353.

[2] Sherwood v. St. Paul R. R., 21 Minn. 127; *s. c.*, 21 Minn. 122.

[3] Welch v. Milwaukee R. R., 27 Wis. 108; Driver v. Western R. R., 32 Wis. 569.

[4] St. Paul R. R. v. Murphy, 19 Minn. 500.

[5] Minnesota R. R. v. Doran, 15 Minn. 230.

[6] Matter of New York Central R. R., 13 N. Y. Sup. Ct. 149.

[7] *Ibid.*

[8] Walker v. Old Colony R. R., 103 Mass. 10; Presbrey v. Old Colony R. R., 103 Mass. 1.

which will be damaged.[1] The English Lands Clauses Act[2] provides, that if a tract of land of less than half an acre is separated by the railway from the main tract of land, the owners may insist on the company's taking the same; or, if the expense of making suitable communication with the separated piece is greater than the value of such tract, the company may insist on purchasing at a valuation.

§ 168. **Market value.** — The owner is entitled, not simply to such sum as the property would bring at forced sale, or under peculiar circumstances, but to such sum as the property is worth in the market, — that is, to persons generally, — if those desiring to purchase were found, who were willing to pay its just and full value.[3] It is not proper to consider what one would give rather than be turned out of the premises;[4] or what was given as a compromise price by the public, when there could be no other purchaser, and the seller had the option of selling, or awaiting condemnation proceedings to assess the price.[5] Nor is it proper to add to the value because the land was necessary and indispensable to the railroad.[6] Offers by way of compromise are not admissible. The question whether an offer was made by way of compromise is a question of law, to be settled by the court before the evidence would be admissible as competent.[7] The market value must be arrived at by the opinions of witnesses, the value of whose testimony may be shown by cross-examination.[8] Value rests merely in

[1] Jones v. Chicago R. R., 68 Ill. 380; Mix v. Lafayette R. R., 67 Ill. 319.

[2] 8 & 9 Vict., c. 18, §§ 93, 94.

[3] Patterson v. Boom Co., 3 Dill. 465; Lawrence v. Boston, 119 Mass. 126; Somerville R. R. v. Doughty, 22 N. J. L. 495; Robb v. Maysville Turnpike, 3 Metc. (Ky.) 117; Memphis v. Bolton, 9 Heisk. 508.

[4] Lawrence v. Boston, 119 Mass. 126; Tufts v. Charlestown, 4 Gray, 537; Robb v. Maysville Turnpike, 3 Metc. (Ky.) 117.

[5] Cobb v. Boston, 112 Mass. 181; Fall River Works v. Fall River, 110 Mass. 428; Howard v. Providence, 6 R. I. 514.

[6] Virginia R. R. v. Elliott, 5 Nev. 358; Penny v. Penny, 37 L. J. (Ch.) 340.

[7] Davis v. Charles River R. R., 11 Cush. 506.

[8] Snow v. Boston R. R., 65 Me. 230; Dwight v. Hampden, 11 Cush. 201;

opinion. Hence persons acquainted with the value of the property may state their opinions as to the value and the amount of damages; and such persons are not necessarily experts.[1] Knowledge acquired as a county commissioner, assessor, or selectman, in laying out public ways or assessing damages, or from sales of other property in the vicinity, make a person a proper witness.[2] The price which the owner gave may be put in evidence; and then the owner may be permitted to show the circumstances under which he bought, and the improvements made by him, and in so doing may put in his deeds.[3] It is not proper to ask the average annual net profits of the strip taken. Profits vary with cost of labor, etc. The basis should be the market value of the land.[4] Market value would not include the price of coal or minerals in land, because that would necessitate inquiry into the cost of raising it; and hence what would be given for the land with the coal in it is the only rule.[5] The market value of the land is to be considered, and the jury should not consider the expenditures that may have been made upon the property. The expenditures may not have increased the value to the amount of the expenditures. Whether the expenditures which had been made upon the land were wise or unwise, whether voluntarily or compulsorily made in order to abate a nuisance, the cost of such expenditures is not necessarily to be taken as additional value to the land as it would have been without such expenditures.[6]

Pennsylvania R. R. *v.* Bunnell, 81 Pa. 414; Lafayette R. R. *v.* Winslow, 66 Ill. 219; Illinois R. R. *v.* Von Horn, 18 Ill. 257; Simmons *v.* St. Paul R. R., 18 Minn. 184.

[1] Shattuck *v.* Stoneham R. R., 6 Allen, 115; Swan *v.* Middlesex, 101 Mass. 173; Whitman *v.* Boston R. R., 7 Allen, 313; Wyman *v.* Lexington R. R., 13 Metc. 316; Inhabitants of West Newbury *v.* Chase, 5 Gray, 421; Walker *v.* Boston, 8 Cush. 279.

[2] Swan *v.* Middlesex, 101 Mass. 173; Sexton *v.* New Bridgewater, 116 Mass. 200; Dickenson *v.* Fitchburg, 13 Gray, 546.

[3] Ham *v.* Salem, 100 Mass. 350; The Commonwealth *v.* Pittsburgh R. R., 58 Pa. 26.

[4] Stockton R. R. *v.* Galgiani, 49 Cal. 139.

[5] Searle *v.* Lackawanna R. R., 33 Pa. 57.

[6] Squire *v.* Somerville, 120 Mass. 579.

§ 169. **Expert witnesses.** — There must be some special knowledge on the part of the witness to render him admissible as a witness to give an opinion on values. A farmer cannot be a witness as to the value of a fishing-privilege.[1] The true inquiry is, whether the witness is sufficiently informed on the subject to give evidence of the value of the property. How that information or knowledge was acquired is quite immaterial, if it really exist.[2] The witness may be called upon to state his reasons for fixing the damages at the sum stated.[3] The jury can perceive the force of reasoning, the soundness of logic, and the capacity to give an opinion. The admission of expert testimony is largely in the discretion of the court, — that is, as to whether or not the witness is properly an expert.[4] The credibility of a witness and his capacity as an expert may be shaken by cross-examination.[5] It is not necessary that the witness should have been actually on the premises. He may be acquainted with the mwithout having gone on them; and facts tending to weaken his testimony as an expert may be brought out on cross-examination.[6] An inhabitant of a town can testify as to the value of lands in the town, if familiar with the lot and with sales in the town, although he may have bought no other land than that on which he lives, or even if he lives on leased ground.[7] A shoemaker who has been in this country seventeen years, and has occupied different houses in the city, and sublet the house he was in, would not be admitted to prove the value of real estate, because it did not appear that the witness had ever bought and sold real estate, or had means of forming an

[1] Boston R. R. v. Montgomery, 119 Mass. 114.

[2] Whitman v. Boston R. R., 7 Allen, 313.

[3] Sexton v. New Bridgewater, 116 Mass. 200.

[4] Howard v. Providence, 6 R. I. 514; Buffum v. New York R. R., 4 R. I. 221.

[5] Fowler v. Middlesex, 6 Allen, 92; Dickenson v. Fitchburg, 13 Gray, 546; Central Pacific R. R. v. Pearson, 35 Cal. 247.

[6] Lehmicke v. St. Paul R. R., 19 Minn. 464.

[7] Pinkham v. Chelmsford, 109 Mass. 225; Whitman v. Boston R. R., 7 Allen, 313; Rondout R. R. v. Deyo, 5 Lans. 298.

intelligent opinion derived from an adequate knowledge of the nature and kind of property in question.[1] Experts cannot give an opinion as to the value of a reversion in land under a railroad, for no one can know how long it will continue.[2] The opinions of experts should be confined to the land in controversy,[3] and the consideration of damages must be confined to the land in controversy, and evidence is not admissible of damages on other lands, or damages caused by the construction of another railroad.[4]

§ 170. **Sales of similar property.** — Ordinarily, sales of property similar to that proposed to be condemned are not admissible in evidence, for the reason that the jury cannot determine what motives of necessity or fancy may have dictated the prices obtained.[5] If evidence of sales were admissible, the other side would have the right to controvert each transaction and investigate it on its merits, which would lead to interminable issues.[6] Evidence cannot be given of offers to sell by others,[7] or of purchase by the party condemning,[8] as an evidence of value. If, however, the property is of such a nature that there cannot be considered a market demand for it, such sales may be admitted in evidence to determine value.[9] In some of the states, evidence

[1] Whitney *v.* Boston, 98 Mass. 312.

[2] Boston R. R. *v.* Old Colony R. R., 8 Allen, 142.

[3] Rand *v.* Newton, 6 Allen, 38; Wyman *v.* Lexington R. R., 13 Metc. 316.

[4] Brunswick R. R. *v.* McLaren, 47 Ga. 546.

[5] Pennsylvania R. R. *v.* Bunnell, 81 Pa. 414; Pittsburgh R. R. *v.* Rose, 74 Pa. 362; East Pennsylvania R. R. *v.* Hiester, 40 Pa. 53; Greenville R. R. *v.* Partlow, 5 Rich. L. 428; Selma R. R. *v.* Keith, 53 Ga. 178; Lehmicke *v.* St. Paul R. R., 19 Minn. 464; Central Pacific R. R. *v.* Pearson, 35 Cal. 247.

[6] Central Pacific R. R. *v.* Pearson, 35 Cal. 247.

[7] Winnisimmet Co. *v.* Grueby, 111 Mass. 543; Fowler *v.* Middlesex, 6 Allen, 92; Dickenson *v.* Fitchburg, 13 Gray, 546; Davis *v.* Charles River R. R., 11 Cush. 506; Chapin *v.* Boston R. R., 6 Cush. 422; Montclair R. R. *v.* Benson, 36 N. J. L. 557.

[8] Upton *v.* South Reading R. R., 8 Cush. 600; St. Joseph R. R. *v.* Orr, 8 Kan. 419; Central Pacific R. R. *v.* Pearson, 35 Cal. 247.

[9] Patterson *v.* Boom Co., 3 Dill. 465.

of actual sales of neighboring property is admissible.[1] In New Hampshire, it may be shown what the railroad condemning has paid for other land in the vicinity,[2] and what has been received at an administrator's sale of an undivided interest. The value of an undivided interest is less certain than a separate interest, but is an approximation.[3] In determining what sales shall be admissible as evidence of value, much is in the discretion of the court as to how recent in time or how adjacent in place the sales must have been.[4] Sales of land the year previous may be rejected, as too remote in point of time to have any material bearing.[5] In case of wild or undesirable lands, such as flats or islands, sales from eight years to one year before, and from one to six miles distant, may be admitted, in the absence of more recent sales.[6] Evidence of the value of ice-privileges on ponds seven or eight miles distant has been rejected.[7] A sale seventeen years back may be proved, and the changes in value may be brought out on cross-examination.[8] Cross-examination should bring out the reasons why purchasers may have given prices greater than the real value.[9] The rule as to town lots would be different from that applied to vacant or wild lots. In estimating the value of a vacant lot, evidence is not admissible to show the value of an improved estate, when it appears that the sum was a gross sum, not only for land taken, but also for damages to the entire estate.[10] The price given on an award by arbitrators is not admissible.[11]

[1] Shattuck v. Stoneham R. R., 6 Allen, 115; Edmands v. Boston, 108 Mass. 535; Moale v. Baltimore, 5 Md. 314.

[2] Concord R. R. v. Greely, 23 N. H. 237.

[3] March v. Portsmouth R. R., 19 N. H. 372.

[4] Ham v. Salem, 100 Mass. 350; Paine v. Boston, 4 Allen, 168; Montclair R. R. v. Benson, 36 N. J. L. 557; Chandler v. Jamaica Pond Co., 122 Mass. 305.

[5] Green v. Fall River, 118 Mass. 262.

[6] Benham v. Dunbar, 103 Mass. 365.

[7] Ham v. Salem, 100 Mass. 350.

[8] Whitman v. Boston R. R., 7 Allen, 313.

[9] Wyman v. Lexington R. R., 13 Metc. 316; Boston R. R. v. Old Colony R. R., 8 Allen, 142.

[10] Presbrey v. Old Colony R. R., 103 Mass. 1.

[11] White v. Fitchburg R. R., 4 Cush. 440.

The consideration paid in a deed of purchase recently made may be admitted, as tending to enlighten the jury.[1] The price paid for right of way through adjoining tracts is not admissible, unless uniformity of the land is first shown.[2] Evidence of the value of a lot is inadmissible from the sale of a lot one thousand feet off, and in another town, similar only in that they were both low land and traversed by a brook, but dissimilar in respect of access by streets, of nearness to other houses, and of likelihood of coming into market, and in that the sale was made three years before, and in the meantime there had been a general advance in the value of lands in both towns.[3] The difference in value may be shown by sales of other property similarly situated, before and after the construction of the road, or by the difference in rental value, if held for the purpose of renting. If there have been no sales, then the effect on the property may be shown, to aid the jury.[4]

§ 171. **Rents of similar property.** — In considering the value of a leasehold, it is within the discretion of the court to permit a witness who underlets rooms in the vicinity, and who, for this purpose, has informed himself generally of the rents of buildings, to give an opinion, although he has not examined the building in question;[5] or, when a part of the building is taken, to show the present rental value of the building.[6]

§ 172. **Evidence of assessment for taxation — Of commissioners' report — Admissions of owner.** — The valuation made by the assessor, for purposes of taxation, is not admissible in evidence, the determination of value having

[1] Jones *v.* Chicago R. R., 68 Ill. 380.
[2] King *v.* Iowa Midland R. R., 34 Iowa, 458.
[3] Chandler *v.* Jamaica Pond Co., 122 Mass. 305.
[4] St. Louis R. R. *v.* Haller, 82 Ill. 208.
[5] Lawrence *v.* Boston, 119 Mass. 126.
[6] Edmands *v.* Boston, 108 Mass. 535.

been made for a different purpose.[1] Nor is the return made by the owner conclusive upon him, but is, perhaps, admissible to contradict his evidence in chief.[2]

The estimate of damages made by commissioners in their report, which report also directed the railroad company to maintain a way, is admissible before a sheriff's jury, in estimating damages.[3] The report is proper evidence of the value found by the commissioners,[4] especially in case of a suit on the award.[5]

In fixing the value of lands taken, the owner's acts and declarations may be shown, as a means of fixing the value of the property, — as, that he had offered it for a certain price, and had sold a portion at the same rate.[6]

§ 173. **Value not estimated solely from present use.** — Property which may be valuable for some uses, and adapted to such uses, may not at the time of condemnation be devoted to such uses. To confine the estimate of the value of property to the present value, as determined from present income, would be unfair. That would prevent the owner from making a change in his business. The correct rule is the value of the property for sale, in view of the uses to which it may be put, and not simply its productiveness to the owner in the condition in which he has seen fit to leave it.[7] The value should be based on the uses to which men of ordinary prudence, economy, and wisdom would devote the property, if it was their own property.[8] Prospective

[1] Brown *v.* Providence R. R., 5 Gray, 35.

[2] Virginia R. R. *v.* Henry, 8 Nev. 165.

[3] White *v.* Boston R. R., 6 Cush. 420.

[4] St. Joseph R. R. *v.* Orr, 8 Kan. 419; Missouri R. R. *v.* Owen, 8 Kan. 409.

[5] Fiske *v.* Chesterfield, 14 N. H. 240.

[6] East Brandywine R. R. *v.* Ranck, 78 Pa. 454.

[7] Mississippi River Bridge *v* Ring, 58 Mo. 491; Burt *v.* Wigglesworth, 117 Mass. 302; Matter of Furman St., 17 Wend. 649; Somerville R. R. *v.* Doughty, 22 N. J. L. 495; Dorlan *v.* East Brandywine R. R., 46 Pa. 520; Haslam *v.* Galena R. R., 64 Ill. 353; Regina *v.* Brown, 36 L. J. (Q. B.) 322.

[8] Dwight *v.* Hampden, 11 Cush. 201; Matter of Furman St., 17 Wend.

improvements cannot be shown, — as, that the rental value of the land, with a suitable and proper building upon it, would be a certain sum, or that the city council contemplated making improvements which would benefit and enhance the value of the property in question.[1] So far as the market value was in fact affected by the knowledge of what was to be done, or of what was contemplated, the owner was entitled to it. The evidence is not competent, as independent evidence, to show what the market value was.[2] The jury may take into account the profitable uses to which the land might be applied on account of its proximity to the stations of two great lines of railroad terminating at tide-water.[3] Evidence may be given that the property taken was in demand for the purpose of erecting shops of a certain size; but on cross-examination it may be shown that the shops on the land taken were not of the size claimed to be in demand.[4] Surplus water-power should be valued at its actual market value, not what it would be worth if new mills and machinery were erected to employ it.[5] The value of the land if a wharf was erected cannot be shown in the condemnation of the same land for a wharf;[6] or the value if a franchise could be obtained from the state;[7] or if devoted to the pork-packing business;[8] or if otherwise improved.[9] Evidence is not admissible to prove the value for manufacturing

649; Matter of New York Central R. R., 13 N. Y. Sup. Ct. 149; Shenango R. R. v. Braham, 79 Pa. 447; Schuylkill Co. v. Thoburn, 7 Serg. & R. 411; Harrison v. Young, 9 Ga. 359.

[1] Burt v. Wigglesworth, 117 Mass. 302.

[2] Cobb v. Boston, 112 Mass. 181; William and Anthony Sts., 19 Wend. 678; Matter of Furman St., 17 Wend. 649.

[3] Eastern R. R. v. Boston R. R., 111 Mass. 125; Boston R. R. v. Old Colony R. R., 12 Cush. 605.

[4] Whitney v. Boston, 98 Mass. 312.

[5] Dorlan v. East Brandywine R. R., 46 Pa. 520; Selma R. R. v. Keith, 58 Ga. 178.

[6] Eddings v. Seabrook, 12 Rich. L. 504.

[7] Central Pacific R. R. v. Pearson, 35 Cal. 247.

[8] Selma R. R. v. Keith, 58 Ga. 178.

[9] Fleming v. Chicago R. R., 84 Iowa, 358.

purposes of a building abandoned for a factory and used as a tenement-house.[1] Timber-land cannot be valued as tillable land, on the ground that it would cost the worth of the timber to render it tillable. This would deprive the owner of the value of the timber, which he is under no obligation to remove.[2] The witness may be asked for what purposes the land was valued, and it may be shown that it was valued for other purposes.[3] It is not allowable to ask the owner what would be his probable future use of his land,[4] or to what purposes it was adapted.[5] The proposed use by the condemning party may be shown for the purpose of lessening damages.[6] Such use might make the land undesirable for residence purposes, yet the condemning party might show, in rebuttal, that it was rendered much more valuable for warehouse purposes.[7] The existence, on the land, of mines or water-power, unutilized, would affect the market value.[8] The fact that the land taken was the only available site for a bridge gives it a value greater than its agricultural value, and it must be so estimated.[9] The present use may be the only use to which the property could be put, — as in case of land conveyed, with limitations, to a religious congregation. The damages would be to the land for the use to which it was devoted.[10] The corporation condemning may have a special privilege of erecting works, which privi-

[1] New Britain *v.* Sargent, 42 Conn. 137.

[2] Rider *v.* Striker, 63 N. Y. 136.

[3] Colvill *v.* St. Paul R. R., 19 Minn. 283.

[4] Fairbanks *v.* Fitchburg R. R., 110 Mass. 224; Pinkham *v.* Chelmsford, 109 Mass. 225.

[5] Conter *v.* St. Paul R. R., 22 Minn. 342.

[6] Dickenson *v.* Fitchburg, 13 Gray, 546.

[7] Mix *v.* Lafayette R. R., 67 Ill. 319.

[8] Haslam *v.* Galena R. R., 64 Ill. 353.

[9] Young *v.* Harrison, 17 Ga. 30; Harrison *v.* Young, 9 Ga. 359.

[10] First Parish *v.* Middlesex, 7 Gray, 106; Matter of Albany St., 11 Wend. 149. If land devoted to consecrated purposes is taken, and devoted to secular purposes, the English rule would require compensation according to its value for secular purposes. Hilcoat *v.* Archbishops of Canterbury and York, 19 L. J. (C. P.) 376; *Re* Burial Ground of St. Pancras, 36 L. J. (Ch.) 52.

lege the owner himself could not have; and in such case the owner would not be entitled to damages because he is deprived of that use, nor should the damages be measured by the amount the land would be worth to the company for the purposes to which it alone could devote the land.[1] The owner may show that, prior to the commencement of proceedings, and without any knowledge that the land would be sought for that purpose, he had laid off the same in lots, streets, and alleys, for sale as town lots, and had caused a plat thereof to be made ready for record. He may also show that the land thus subdivided for sale is more valuable than if sold by the acre, or for other purposes; and, in that connection, an unrecorded plat or diagram showing the manner in which the tract has been subdivided, and how such subdivision is affected by the appropriation, is admissible, not as a valid town-plat, but as a scheme or plan for sale, affecting the value of the property. If there has been no such binding dedication, that fact is material as affecting the value of the property when considered as lots, but it does not limit the owner to proofs of value for other purposes.[2]

§ 174. **Assessment should be of the value at the time of taking.**[3] — The owner is not entitled to the increased

[1] Patterson v. Boom Co., 3 Dill. 465. The fact that the land proposed to be condemned by the railroad company had been formerly prepared for use by a railroad company, which had expended considerable money in cuttings and culverts, does not necessarily give the right of way an additional market value. The railroad company is not called upon to pay the owner for advantages which may accrue to it by reason of the particular location of the road. The expenses incurred by a defunct corporation, years ago, can upon no just principle be charged to this company. The land is taken upon the same basis of value as would be the crossing of a stream, which, at the point selected, would cost much less for bridging than any other available point on the stream. It is not the advantage to the railroad company, but the detriment to the landowner. Black River R. R. v. Barnard, 16 N. Y. Sup. Ct. 104.

[2] Cincinnati R. R. v. Longworth, Supreme Court Commission, Ohio, 5 Cent. L. J. 333; 30 Ohio St. 108.

[3] Hosher v. Kansas City R. R., 60 Mo. 329; Patterson v. Boom Co., 3 Dill. 465; Arnold v. Covington Bridge, 1 Duv. 372.

value occasioned by the proposed improvement. The value should be estimated irrespective of the proposed improvement.[1] Land which is taken by widening of a street is not to be estimated as of the value of land on a street as wide as the proposed street.[2] The assessment should be of the value at the time of taking, although the statute provided that the title should vest only when compensation was paid.[3] The time of taking cannot be referred to the time of the trial, or to a time when the proceedings were continuing, but should be from the time of the appropriation[4] or appraisement.[5] It frequently happens that long intervals occur between the taking and the trial of the question of compensation, especially when compensation is not required to be paid in advance. The damages should include the most injurious consequences to the property by the proposed taking, as if the proposed occupation were complete and the damages resulting were all known.[6] The legislature cannot fix the time of taking as prior to the time when the taking really occurs, so as to cause the owner to lose the enhanced value at the time of the taking; that is, when the land cannot be occupied until compensation is paid, the owner could not be charged with rent from the time fixed by the legislature to the time of the actual condemnation.[7] The owner is not prevented from improving his property, although the proposed condemnation was known to him. He need not wait on the movements of the corporation, and damages must be paid for improvements made up to the time of the condemnation.[8]

[1] Vanblaricum v. The State, 7 Blackf. 209.

[2] Dorgan v. Boston, 12 Allen, 223.

[3] Burt v. Merchants' Ins. Co., 115 Mass. 1.

[4] Logansport R. R. v. Buchanan, 52 Ind. 163; Indiana R. R. v. Hunter, 8 Ind. 74; Milwaukee R. R. v. Eble, 4 Chand. 72.

[5] Metler v. Easton R. R., 37 N. J. L. 222.

[6] Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362; Schuylkill Co. v. Thoburn, 7 Serg. & R. 411.

[7] Cook v. Park Commissioners, 61 Ill. 115.

[8] Driver v. Western R. R., 32 Wis. 569.

The value at the time of the actual condemnation,[1] or of the constructive appropriation, must be paid when such an act as the filing an award is declared to constitute the taking.[2] When the time is fixed for an appropriation, it does not signify that the improvement itself is not completed for two years.[3] The company cannot, however, delay the proceedings, without payment of compensation, as long as four years, and then endeavor to assess the value at the time of a constructive appropriation. The owner is entitled, under such circumstances, to a new valuation, to cover the enhanced value of the property. A year's delay is all that could be countenanced.[4]

§ 175. **Interest on award.** — Interest should run from the time of the taking,[5] for until that time the owner has the use of the land, and until then there could be no demand and no default.[6] Interest will always run from the time of demand.[7] If the payment is delayed by litigation, interest should be allowed.[8] The owner should not be kept out of his property and his money at the same time. Hence the court will always allow interest, unless a tender or deposit is made.[9] If the amount is deposited in the state

[1] Daniels *v.* Chicago R. R., 41 Iowa, 52.

[2] Warren *v.* St. Paul R. R., 21 Minn. 424; Sherwood *v.* St. Paul R. R., 21 Minn. 122.

[3] Delaware R. R. *v.* Burson, 61 Pa. 369.

[4] Bensley *v.* Mountain Water Co., 13 Cal. 306.

[5] Bangor R. R. *v.* McComb, 60 Me. 290; Kidder *v.* Oxford, 116 Mass. 165; Delaware R. R. *v.* Burson, 61 Pa. 369; Illinois R. R. *v.* McClintock, 68 Ill. 296; Cook *v.* Park Commissioners, 61 Ill. 115; Missouri R. R. *v.* Owen, 8 Kan. 409. In Michigan, interest is not considered to be due except by custom or statute. The People *v.* La Grange, 2 Mich. 187.

[6] Gay *v.* Gardiner, 54 Me. 477; Reed *v.* Hanover Branch R. R., 105 Mass. 303; Detmold *v.* Drake, 46 N. Y. 318; Hamersley *v.* New York, 56 N. Y. 533; Metler *v.* Easton R. R., 37 N. J. L. 222; Warren *v.* St. Paul R. R., 21 Minn. 424; Knauft *v.* St. Paul R. R., 22 Minn. 173.

[7] Clough *v.* Unity, 18 N. H. 75; Fiske *v.* Chesterfield, 14 N. H. 240.

[8] Haverhill Bridge *v.* County Commissioners, 103 Mass. 120; Whitman *v.* Boston R. R., 7 Allen, 313; Warren *v.* St. Paul R. R., 21 Minn. 424.

[9] Concord R. R. *v.* Greely, 23 N. H. 237.

treasury for the use of the owner, and might be taken without prejudice to his right of appeal and claim for increase of damages, interest will not be allowed on the tender during the time of appeal, but only on the excess given on appeal.[1] If no increase is obtained on appeal, no interest will be given.[2] Otherwise, if security alone is given; in that case, the owner would be out of his money and his land at the same time, and should have interest to cover the use of the land.[3] The right to use the land is not always equivalent to the interest, for the owner cannot dispose of his land, or rent or improve it; and when it is shown that the owner actually derived less value from the land than the interest, this may be shown, and the amount derived be deducted from the interest.[4] The right to take may depend on the confirmation of the proceedings. Until that time, the owner has the use of the property, and can ordinarily claim only from the time the title passes.[5] The duty of making compensation includes the duty of ascertaining it, and hence the condemning party must pay from the time of taking, although proceedings were not instituted until later.[6] If the statute allows the condemning party two years in which to collect and pay damages, the interest would commence running after the expiration of the two years.[7] Delays in payment require interest to be paid; but where there is a delay of only two days between the award and the tender of the money, the interest will be disregarded by the courts.[8] By statute, the time of payment may be

[1] Shattuck *v.* Wilton R. R., 28 N. H. 269. The English rule is substantially the same. Crystal Palace Rail. Co., 19 Jur. 995.

[2] March *v.* Portsmouth R. R., 19 N. H. 372.

[3] Shattuck *v.* Wilton R. R., 28 N. H. 269.

[4] Warren *v.* St. Paul R. R. 21 Minn. 424.

[5] Norris *v.* Philadelphia, 70 Pa. 332 (qualifying Philadelphia *v.* Dyer, 41 Pa. 463); Harness *v.* Chesapeake Canal, 1 Md. Ch. 248; Hamilton *v.* Annapolis R. R., 1 Md. Ch. 107; Chesapeake R. R. *v.* Bradford, 6 W. Va. 220.

[6] Railroad *v.* Gesner, 20 Pa. 240; Young *v.* Harrison, 17 Ga. 30.

[7] Chicago *v.* Wheeler, 25 Ill. 478.

[8] Scott *v.* St. Paul R. R., 21 Minn. 322.

placed at thirty days from the award, and in such cases the interest will not run until the expiration of that time.[1]

§ 176. **Interference with use before taking.** — The general rule is, that the damages should date from the taking, and that interest should run from that time. The occupation, by the owner, of his property, up to the time of the taking, is presumed to compensate for interest on award. In the case, however, of a building which is devoted to offices to be sublet to various parties, the owners of the building may show that, by reason of the proceedings, they have been unable to derive any benefit from the use of the buildings, and may recover a reasonable allowance for this interference.[2]

§ 177. **Interference with use during construction — Loss of profits.** — No damages are allowed for loss of profits or decline of business, caused by a public improvement, — as, that a railroad has diverted business from a turnpike, or that a new road had changed the line of travel so that the patronage of an old inn had been decreased. Still, there may be such an interruption in business by tearing down the front of a building in widening a street, or constructing a railroad in a street, that damages should be allowed. The rental value of such building, for use, is decreased by such improvement, and damages should be allowed for the necessary expense in moving to another place equally eligible, and the loss of regular, reasonable profits during the time of interruption. The owner cannot properly remain in the old locality and charge up the loss.[3] So, a railroad is entitled to incidental damages occasioned by interruption by another road making a crossing with its road by cutting through an embankment.[4] If time

[1] Phillips v. Pease, 89 Cal. 582.
[2] Edmands v. Boston, 108 Mass. 535.
[3] St. Louis R. R. v. Capps, 67 Ill. 607; Jubb v. Hull Dock Co., 9 Q. B. 443.
[4] Chicago R. R. v. Springfield R. R., 67 Ill. 142.

is given to remove, so that business is not interfered with, there will be no damage for interruption. In a recent case in Illinois, the commissioners awarded as follows: "And if the said improvements shall be retained by the said owners for a period of three months, then we find that no damage has accrued to them (the said owners) by reason of the interruption of their said business; and if the said owners shall retain the possession for two months, then we fix the damage of interruption at sixteen hundred dollars; and if the said owners shall retain the possession one month, then we fix the damages at thirty-two hundred dollars; and for the removal of their tools and implements necessary to carry on their business, we fix the damages at two hundred dollars." The owners tendered the keys within one month, and claimed the $3,200. The court held that the company could take possession at any time it pleased, and that the owners could not dictate the time; and that if entry was not made within the three months, no damages could be recovered.[1]

§ 178. **On a taking subsequent to the improvement.** — It may become necessary to take other land than that originally taken, and, since the first taking, the land has been enhanced in value by the improvement already made. In such a case, the estimate should be of the value at the time of the subsequent taking, and should include the value added by the improvements.[2] The owner might have sold his land, in the interval, at the enhanced value, and his purchaser could not be compelled, on the subsequent condemnation, to take only the original value before the original improvement was contemplated. The owner would be entitled to the same enhanced value as the purchaser.

§ 179. **Taking part of a railroad.** — The damage for

[1] Glennon v. Milwaukee R. R., 79 Ill. 501.
[2] Stafford v. Providence, 10 R. I. 567.

taking a part of a railroad cannot be estimated as of the value of the part taken alone, when the taking would render the rest useless until a new railroad could be erected. The damages should also include loss of time in erecting the new railroad.[1]

§ 180. **Plan of proposed improvement.** — It is proper to put in evidence the plan of the proposed improvement; and the engineer may be asked as to the cuts, embankments, culverts, etc., in order to give an additional idea as to the damages.[2] If the proposed road requires excavation or filling, in order to be reached from adjoining land, that fact is admissible in evidence, to reduce benefits.[3] The official record of the location is admissible.[4] The company may show that a culvert was necessary to the safety of the road, and that such culvert would obviate damages apprehended from an embankment shown on the plan, although the culvert was not shown on the plan. It is presumed that the company will build bridges and culverts in the safest manner for the road; and it will not be presumed that they will be negligent, and make unnecessary damages.[5] If the railroad is to be built in the street, according to a certain ordinance, it is proper to put the ordinance in evidence, as tending to show the probable amount of damages.[6] It is not admissible to ask the engineer how he proposes to make a cut across one railroad for the use of another railroad, or whether the railroad company expected to keep the work in repair. Expectations or intentions of engineers and conductors are not binding on the company.

[1] *In re* Poughkeepsie R. R., 68 Barb. 151. Case where a railroad used for bringing minerals from a mine was taken.

[2] March *v.* Portsmouth R. R., 19 N. H. 372; Nason *v.* Woonsocket R. R., 4 R. I. 377; Rondout R. R. *v.* Deyo, 5 Lans. 298; Jacksonville R. R. *v.* Kidder, 21 Ill. 131; St. Joseph R. R. *v.* Orr, 8 Kan. 419.

[3] Plympton *v.* Woburn, 11 Gray, 415.

[4] Dwight *v.* Hampden, 11 Cush. 201.

[5] Nason *v.* Woonsocket R. R., 4 R. I. 377.

[6] Mix *v.* Lafayette R. R., 67 Ill. 319.

The damage to the company whose road is crossed is such sum as will enable them to keep their track in repair, taking into consideration the changes occasioned by the new crossing.[1] The actual plans are evidence, and must be strictly followed, or there will be a new inquiry of damages.[2] If the company refuse to exhibit plans and profiles, the jury will be authorized to presume that the most injurious mode will be followed in which it might probably be done.[3] The company may be compelled to disclose the proposed use, so that the award may be in reference to the same.[4] The statements of the city engineer, as to the extent of a proposed change in the grade of a street, is competent to be given in evidence in an action for damages by the lot-owner against the city, for injury occasioned by the improvement.[5] A plat properly verified may be used in evidence, to show the situation of lots in controversy, and a witness acquainted with the land and the plat may point out their relative situations to the jury.[6]

[1] Chicago R. R. *v.* Springfield R. R., 67 Ill. 142.

[2] Jacksonville R. R. *v.* Kidder, 21 Ill. 131; Peoria R. R. *v.* Birkett, 62 Ill. 332.

[3] Jacksonville R. R. *v.* Kidder, 21 Ill. 131.

[4] Wilkin *v.* St. Paul R. R., 16 Minn. 271.

[5] Youngstown *v.* Moore, 30 Ohio St. 133. In Ohio, damages are allowed for changes in grade, while the prevailing doctrine in other states is the reverse. See §§ 195, 196.

[6] Rippe *v.* Chicago R. R., 23 Minn. 18.

CHAPTER XVII.

OF DAMAGES CONSIDERED CONSEQUENTIAL.

§ 181. Consequential injury to private property.
182. Legislative authority does not preclude claim for damages — Private inconveniences for the general good.
183. Injury to individual where no land is taken.
184. Reasonable use of adjoining property.
185. Excavations on adjoining lands.
186. Blasting on adjoining lands.
187. Effect of structures on adjoining lands.
188. Cut through a natural barrier.
189. Interference with the flow of surface-water.
190. Discharging contents of sewer, or water-course, or of canal, on land.
191. Diversion of trade — Loss of profits.
192. Interruption of business.
193. Noise — Smoke — Frightening horses — Vibration.
194. Statutes allowing damages considered consequential.

§ 181. **Consequential injury to private property.** — The damages for the value of land taken have always been looked upon as due to the owner. The injuries resulting from the taking, outside of the value of the land, have been frequently denied to the owner, on the ground that such injuries were consequential, and that the sovereign, on a forced purchase of property, should only be held for the value of the land, and not for injuries resulting from the operation of the improvement. This doctrine has been pushed very far, in the early Massachusetts cases.[1] It has been protested against on several occasions, and is not by any means the law of all of the states; or rather, many of the states are establishing a rule which includes,

[1] Thurston v. Hancock, 12 Mass. 220; Callender v. Marsh, 1 Pick. 417. Same doctrine in Pennsylvania: West Branch Canal v. Mulliner, 68 Pa. 357.

in the damages for which compensation must be paid, many items of damage which were at one time considered consequential. Judge Story, in the case of Charles River Bridge v. Warren Bridge,[1] in commenting on the cases above cited, says: "With all possible respect for the opinions of others, I confess myself to be among those who never could comprehend the law of either of those cases, and I humbly continue to doubt if, upon principle or authority, they are easily maintainable." He strongly doubted "whether injury to private property can be done, without compensation, and the owner told that the injury is consequential."

§ 182. **Legislative authority does not preclude claim for damages — Private inconveniences for the general good.** — The legislative authority to do an act resulting in damages to the property of an individual cannot be sustained, without the payment of damages, on the simple claim that the legislature cannot authorize that which is improper. It is beyond the power of the legislature to authorize the infliction of an injury without compensation. Charters should not be construed as evincing any legislative intention to authorize an injury, or to shield the corporation from a common-law action, in case compensation is not provided.[2] The fact that compensation is not provided should not lead the court to suppose that all injuries not provided for were declared by the legislature to be consequential, and, therefore, not subject to compensation. The legislative authority is not to be extended by implication. Mere legislative authority to manufacture gas and buy land will not relieve a corporation from damages which might be considered consequential if the land had been taken under the authority of eminent domain.[3] All injuries and inconveniences which the individual may suffer in consequence

[1] 11 Pet. 420.
[2] Eaton v. Boston & Maine R. R., 51 N. H. 504.
[3] Pottstown Gas Co. v. Murphy, 39 Pa. 257.

of the construction of public works are not to be compensated for. The individual may be put to inconvenience from interruptions at a public crossing over a railroad, but for that he can claim no damages.[1] No provision is made, in the construction of railroads, for damages resulting in loss of income to other roads, or for lawful construction, when no land or materials are taken.[2] Damage of this character is denominated *damnum absque injuria*. This doctrine has been pushed to its utmost verge, and should be qualified rather than extended. An instance of the most advanced character is that of Lawler *v.* Baring Boom Company,[3] where there was a large accumulation of logs in a boom, and there ensued a large rise of water in the stream, and both circumstances combined caused the water to flow back on the plaintiff's land not taken by the proceedings. There was no charge of lack of skill in the erection or management of the boom. The court held the damages occasioned by the boom to be consequential, and that the owner must suffer the injury and inconvenience without complaint or compensation. The obstruction of view of a country residence, or interference with the privacy of a house, by having it overlooked by railroad, are consequential.[4]

§ 183. **Injury to individual where no land is taken.** — Inconveniences resulting to an individual, where no land is taken from him, are consequential, and no damages can be claimed for them. A road laid along a boundary-line may impose upon the owner a new burden of fencing, but this injury is consequential.[5] If the improvement is prudently and skilfully constructed, the consequential

[1] Proprietors of Locks *v.* Nashua R. R., 10 Cush. 385.

[2] Whittieer *v.* Portland R. R., 38 Me. 26.

[3] 56 Me. 443.

[4] Goodbody *v.* Midland Rail Co., Irish Rea. Cas. 20; *In re* Penny, 7 El. & Bl. 660; Regina *v.* Rynd, 16 I. R. C. L. 29.

[5] Kennett's Petition, 24 N. H. 139.

damages resulting do not require compensation.[1] Land may be so near a public improvement as to be necessarily damaged by the construction, and in such cases damages will be allowed, although no land is taken.[2] Buildings may be undermined, wells drained, streams diverted, and for these damages compensation is necessary.[3] An owner whose land is not taken cannot recover damages for obstruction to a creek below his land, which obstruction was caused by the erection of a bridge erected by legislative authority.[4] If the land is injured, and in consequence of an act which would have been the subject of an action at common law but for the statute, compensation may be required and awarded.[5] There would be no action arising out of the construction of a railway near a house, on the ground that there was an inconvenience in crossing by the public highway over the railroad, there being no land taken.[6]

§ 184. **Reasonable use of adjoining property.** — An owner has a right to demand that his neighbor shall not use his property in a way injurious to his own, and a violation of this right constitutes a cause of action. Corporations, when created by the legislature for the purpose of making improvements, are liable as individuals. While their acts may not be trespasses, being done under legislative authority, they will be responsible in damages for violations of the right, set forth in the maxim, *Sic utere tuo ut alienum non lædas.*[7] Throwing dirt against the side of a fence, in constructing a road, if unreasonable, or unnecessary, or unskil-

[1] Hatch *v.* Vermont Central R. R., 25 Vt. 49.

[2] Ashby *v.* Eastern R. R., 5 Metc. 368; Curtis *v.* Eastern R. R., 14 Allen, 55; Brown *v.* Providence R. R., 5 Gray, 35.

[3] Proprietors of Locks *v.* Nashua R. R., 10 Cush. 385; Parker *v.* Boston R. R., 8 Cush. 107.

[4] Clark *v.* Saybrook, 21 Conn. 313.

[5] Chamberlain *v.* West End Rail. Co., 31 L. J. (Q. B.) 201.

[6] Caledonia Rail. Co. *v.* Ogilvy, 2 Macq. H. L. Cas. 229.

[7] Thompson *v.* Androscoggin Improvement Co., 54 N. H. 545; Eaton *v.* Boston & Maine R. R., 51 N. H. 504.

ful, gives an action on the case.[1] An adjoining owner might, without liability, pull down a party-wall, and a corporation having acquired the adjoining property may treat it as a private owner might.[2] The fact that a public improvement, such as a sewer, may be on land adjoining that of a private owner, does not prevent such owner from excavating on his land, although in so doing he may withdraw soil which gives lateral support to the sewer. The public owner has no greater rights than a private owner. The public might condemn an easement of lateral support, if it was so minded.[3] The public property cannot be so used as to cause a deposit of earth on land of adjoining owner.[4]

§ 185. **Excavations on adjoining land.** — Although no land is taken, damages will be allowed for incidental injury resulting from excavations on adjoining land.[5] A railroad company have a right to dig for water on their right of way, even if that digging impairs wells of adjoining owners. Obtaining water for use of the railroad is a proper use of the right of way.[6] The corporation has a right to make excavations on its own land, as an ordinary owner has on his own land, and no damages will be allowed for injuries resulting from careful construction. An individual might not dig his own soil so that his neighbor's soil shall fall in of its own weight; but the charter of a company excavating is a legislative license for such excavation,[7] and the company is not compelled to erect walls to protect adjoining owners from falling-in of their soil, when no carelessness is shown.[8] Damages will be considered, arising from the disappearance

[1] Felch *v.* Gilman, 23 Vt. 88.
[2] Rex *v.* Hungerford Market Co., 5 Ad. & E. 668.
[3] Metropolitan Board *v.* Metropolitan Rail. Co., 38 L. J. (C. P.) 172.
[4] Hendershott *v.* Ottumwa, 46 Iowa, 58.
[5] Whittieer *v.* Portland R. R., 38 Me. 26; Alexander *v.* Milwaukee, 16 Wis. 247.
[6] Hougan *v.* Milwaukee R. R., 35 Iowa, 558.
[7] Boothby *v.* Androscoggin R. R., 51 Me. 318.
[8] Hortsman *v.* Lexington R. R., 18 B. Mon. 218.

of a spring or well, caused by an excavation on adjoining land, as being the results of the use to which the land is put.[1]

§ 186. **Blasting on adjoining lands.** — Damages occasioned by blasting on adjoining lands have been allowed, as being occasioned by the proper construction of the road, although no land is taken from the individual injured. Blasting is proper, and, if conducted carefully and with due precaution, the damages are direct, and should be estimated in the compensation.[2] Such an intrusion on land of others as casting rocks upon it is a taking.[3]

§ 187. **Effect of structures on adjoining lands.** — The public may use the property condemned, in any way in which a private owner might use the same. The private owner may erect such structures as he desires, and if the effect is deleterious on his neighbor, the damage is consequential. A structure on land condemned may interfere with the flow of surface-water, may cause an accumulation of snow on a neighbor's land,[4] or may cause adjoining land to be damaged by washing, and may threaten further damage,[5] and yet the damage be considered consequential. A private owner could not erect an embankment which would obstruct the flow of a stream, and a corporation can do no more; and damages may be recovered in a common-law action, although the embankment may be erected in a proper manner.[6]

[1] Aldrich *v.* Cheshire R. R., 21 N. H. 359; Proprietors of Locks *v.* Nashua R. R., 10 Cush. 385; Parker *v.* Boston R. R., 8 Cush. 107; Peoria R. R. *v.* Bryant, 57 Ill. 473.

[2] Dodge *v.* Commissioners of Essex, 3 Metc. 380; Whitehouse *v.* Androscoggin R. R., 52 Me. 208; Sabin *v.* Vermont Central R. R., 25 Vt. 363; Brown *v.* Providence R. R., 5 Gray, 35; Proprietors of Locks *v.* Nashua R. R., 10 Cush. 385.

[3] St. Peter *v.* Denison, 58 N. Y. 416.

[4] Carson *v.* Western R. R., 8 Gray, 423.

[5] McKenney *v.* Commissioners, 40 Me. 136.

[6] Evansville R. R. *v.* Dick, 9 Ind. 433.

§ 188. **Cut through a natural barrier.** — The proper use of adjoining soil would prevent the cutting of a natural barrier which protected land from overflows from a river. A case illustrating this rule arose in New Hampshire,[1] and the decision is one of marked ability. The cut was not on the plaintiff's land, but on land adjoining. Another case, decided at the same time, was that of the man who owned part of the ridge which served as a barrier. He was allowed such damages only as occurred to him by the cutting of that portion of the ridge beyond his line; that occurring by the cut on his own land is presumed to have been considered in the original assessment. This doctrine is denied in the case of Alexander *v.* Milwaukee;[2] but that case is now looked on as an extreme case, even in Wisconsin.

§ 189. **Interference with the flow of surface-water.** — An interference with the flow of surface-water, caused by a public improvement authorized by law, is a consequential injury. If a railroad or public road, made with reasonable care and skill, incidentally injures adjoining land by obstructing the flow of surface-water, there can be no recovery for such injury;[3] otherwise of an obstruction of a stream or water-course, or of a ditch in which surface-water should be carried off.[4] An individual owner would not be allowed to

[1] Eaton *v.* Boston & Maine R. R., 51 N. H. 504.

[2] 16 Wis. 247.

[3] Hosher *v.* Kansas City R. R., 60 Mo. 329; Munkers *v.* Kansas City R. R., 60 Mo. 334; Bellinger *v.* New York Central R. R., 23 N. Y. 42; Raleigh R. R. *v.* Wicker, 74 N. C. 220. Highways may be constructed on embankments which do not provide a sufficient culvert for carrying off the surface-water from adjoining lands. Gould *v.* Booth, 66 N. Y. 62.

[4] Waterman *v.* Connecticut R. R., 30 Vt. 610; Franklin *v.* Fisk, 13 Allen, 211; Raleigh R. R. *v.* Wicker, 74 N. C. 220; Ross *v.* Clinton, 46 Iowa, 606. A railroad company is not responsible for interference with flow of surface-water where there is no marked stream or brook, and where there is no water but at exceptional seasons of the year. There may be injury to land left, by the use that was to be made of the land taken; and that should be included in the assessment, as a damage properly recoverable in that form. Morrison *v.* Bucksport R. R., 66 Me. 353. Surface-water arising from rains and snows cannot be collected into a single channel, and cast in large volume upon the premises of

use his property so as to cause the overflow of a natural stream. The owner may build on his own land a barrier, and thus stop a flow of surface-water on his own land, although in so doing he may stop up a culvert.[1] The damages which result from all obstructions of the kind mentioned, where they necessarily result from the taking, are presumed to have been considered by the commissioners in assessing damages, and hence are not the subject of a subsequent action.[2] Compensation should be given for making and maintaining a railway without sufficient drainage to protect the neighboring property.[3] For failure to maintain drains sufficient to carry off rain and spring water, the English doctrine gives an action for damages, outside of the compensation allowed by the Lands Clauses Consolidation Act.[4]

§ 190. **Discharging contents of sewer, or water-course, or of canal, on land.** — The conveyance of water from land condemned, upon that of an owner adjoining, is a damage to be considered, although no land is taken. The question should be submitted to a jury, whether or not the discharge of the water was necessary and proper in constructing the railroad. Not that the necessity should be an absolute physical necessity, but reasonably necessary; that is, if the work could not otherwise be accomplished without great or disproportionate expense or labor, or not so safely or effect-

another. Bastable *v.* Syracuse, 15 N. Y. Sup. Ct. 587; Sleight *v.* Kingston, 18 N. Y. Sup. Ct. 594.

[1] Franklin *v.* Fisk, 13 Allen, 211; Flagg *v.* Worcester, 13 Gray, 601. Water flowing in several drains upon a highway cannot be collected in one drain, and the flow imposed upon the land of an adjoining owner. The natural outlets for the drainage must not be changed; and the owner may obstruct the flow of such water, although such obstruction may injure the turnpike. Limerick Turnpike Co.'s Appeal, 80 Pa. 425.

[2] Walker *v.* Old Colony R. R., 103 Mass. 10; Turner *v.* Dartmouth, 13 Allen, 291; Flagg *v.* Worcester, 13 Gray, 601; Grand Rapids R. R. *v.* Horn, 41 Ind. 479.

[3] Regina *v.* North Union Rail. Co., 1 Eng. Rail. Cas. 729.

[4] Bagnall *v.* London, etc., Rail. Co., 31 L. J. (Exch. Ch.) Exch. 480.

ively.[1] A sewer is a proper improvement, and consequential damages should not be allowed; but, if the sewer operates as a nuisance, by discharging filth into private docks, or upon flats owned by individuals, the damages cease to be consequential, and become damages directly resulting from the construction of the public improvement.[2] A canal company cannot discharge water on land not taken, notwithstanding such injury was necessary to save a greater injury to the canal. Such an use of adjoining land could not have been contemplated by the commissioners who assessed damages on the taking. Such damages would be direct, and not consequential. If the company needed lands for such purposes, they should have been regularly condemned.[3] A city cannot discharge the drainage of a city into a mill-race used by a mill company, without providing an assessment for such taking, as if taken by the exercise of eminent domain.[4] The diversion of a natural stream, by street improvements, is a damage requiring compensation.[5]

§ 191. **Diversion of trade — Loss of profits.** — The diversion of trade from one locality to another, caused by the building of a public improvement, is a damage strictly consequential, for which no compensation should be made.[6] Every man who invests in business does so on the risk of improvements in methods of doing business, and that the improvement may cause loss to him. A man who has made

[1] Curtis *v.* Eastern R. R., 14 Allen, 55.

[2] Haskell *v.* New Bedford, 103 Mass. 208; Shawneetown *v.* Mason, 82 Ill. 337. The diversion of a stream just above a ferry-slip, by the construction of a new sewer, which caused the discharge of the waters of the stream, together with surface-water and sewage, whereby the slip was filled with sand and dirt, is actionable. Sleight *v.* Kingston, 18 N. Y. Sup. Ct. 594.

[3] Hooker *v.* New Haven Co., 15 Conn. 312.

[4] Columbus *v.* Woollen Mills, 88 Ind. 435.

[5] Mayor of Helena *v.* Thompson, 29 Ark. 569.

[6] Thompson *v.* Androscoggin Improvement Co., 54 N. H. 545; Whitman *v.* Boston R. R., 3 Allen, 133; Boston R. R. *v.* Old Colony R. R., 12 Cush. 605; Proprietors of Locks *v.* Nashua R. R., 10 Cush. 385; Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; Selma R. R. *v.* Camp, 45 Ga. 180.

money by the profit of letting bridle-horses to carry tourists up a mountain cannot be allowed damages on account of an improved road up the mountain, although his business may thereby be destroyed.[1] No damages can be allowed for the good-will of a business interfered with by condemnation of buildings,[2] or to prospective profits rendered impossible by public improvements.[3]

§ 192. **Interruption of business.** — Damages should be allowed for interruption to business, caused by taking down the front of a building in widening a street. Compensation should not embrace losses caused by being compelled to move to a less advantageous business stand while the alterations are going on, nor the losses by customers going to other stores; but should embrace the damages to the average earnings which a man in business, with a stock of merchandise on hand, may be supposed temporarily to lose for the actual time his business is necessarily suspended, taking into consideration the nature of the business and the season of the year. If a removal is rendered necessary, there should be added the necessary expense of removal.[4] In case of a lessee, either the rent he would have to pay or the expense of removal, — not both. Rent would not be allowed on an unreasonable delay to rebuild.[5] The simple fact that sales were less would not be admissible, unless connected with other evidence showing that the diminution was in fact occasioned by the operation of widening the street.[6] Ordinary improvements in a public street, where no land is taken, give no claim for damages.[7] Obstruction of the means of access to business houses, entailing a per-

[1] Mount Washington Road, 35 N. H. 134.
[2] Edmands *v.* Boston, 108 Mass. 535.
[3] Schuylkill Co. *v.* Freedley, 6 Whart. 109.
[4] Patterson *v.* Boston, 23 Pick. 425; *s. c.*, 20 Pick. 159.
[5] Patterson *v.* Boston, 23 Pick. 425.
[6] Brooks *v.* Boston, 19 Pick. 174.
[7] Plant *v.* Long Island R. R., 10 Barb. 26.

ceptible loss of custom, constitutes a damage proper to be considered.[1]

§ 193. **Noise — Smoke — Frightening horses — Vibration.** — The annoyance from noise, smoke, etc., caused by passing trains; the frightening of horses, endangering the lives of children and cattle, are consequential damages, for which no compensation is to be made.[2] For any negligence in killing of stock, a recovery can be had.[3] It has been considered a damage to grazing land to run through the tract a railroad, as the cattle would thereby be disturbed so as not to fatten so readily.[4] Anticipated annoyance of worshippers in a meeting-house, by the use of a new highway brought up close to the church, caused by noisy and dissolute persons riding by for pleasure on the Sabbath, is no legal ground for damages. The jury cannot act on the assumption that the land-owners will be annoyed by the unlawful acts of others. If others act unlawfully, they may be punished.[5] No damages will be allowed for interfering with the privacy of one's estate, caused by a railroad bringing unwelcome visitors near the owner's grounds.[6] It was considered to be a proper claim for damages that vibration,

[1] East and West India Docks Rail. Co. *v.* Gattke, 8 Mac. & G. 155; Chamberlain *v.* West End Rail. Co., 31 L. J. (Q. B.) 201. But where the obstruction is of a public street, and temporary in its nature, no compensation would be allowed. Rickets *v.* Metropolitan Rail. Co., L. R. 2 H. L. 175. This last case discusses the whole question of obstruction of ways, at great length, and with a full citation of the English and Irish cases.

[2] Parrot *v.* Cincinnati R. R., 10 Ohio St. 624; Proprietors of Locks *v.* Nashua R. R., 10 Cush. 385; Bordentown Turnpike Co. *v.* Camden R. R., 17 N. J. L. 314; Caledonia Rail. Co. *v.* Ogilvy, 2 Macq. H. L. Cas. 229; Wood *v.* Stourbridge Rail. Co., 16 C. B. (N. S.) 222. *Contra*, Elizabethtown R. R. *v.* Combs, 10 Bush, 382; Chicago R. R. *v.* McGinnis, 79 Ill. 269; Stone *v.* Fairbury R. R., 68 Ill. 394; Indianapolis R. R. *v.* Hartley, 67 Ill. 439; South Carolina R. R. *v.* Steiner, 44 Ga. 546; Jeffersonville R. R. *v.* Esterle, 13 Ky. 667.

[3] Alabama R. R. *v.* Burkett, 46 Ala. 569; Raleigh R. R. *v.* Wicker, 74 N. C. 220.

[4] Baltimore R. R. *v.* Thompson, 10 Md. 76.

[5] First Parish *v.* Middlesex, 7 Gray, 106.

[6] Patten *v.* Northern Central R. R., 33 Pa. 426.

caused by the running of a railroad, rendered beer in a public-house unfit for consumption.[1] This is a species of damages which cannot be demanded after the construction and operation of the road in the ordinary manner of operating roads, but is to be settled, once for all, in the assessment for damages for the taking.[2]

§ 194. **Statutes allowing damages considered consequential.** — Sometimes statutes regulating the assessment of damages are so general in their terms that they are allowed to include damages otherwise considered consequential.[3] A statute providing for the payment of damages to any person "sustaining any damages" may recover for inconveniences not covered by the general acts.[4] A statute providing for "all damages that may be occasioned by the taking of any such land" should include damages otherwise considered consequential, — such as inconveniences from excavations endangering houses, embankments in streets, obstructing streets, obstructing air and light, and rendering buildings undesirable or unfit for occupation.[5] Under the expression, "those that may be injured," will be included any injuries which would be actionable at common law.[6] Damages of this nature need not be secured before taking, or paid in advance, as in case of ordinary damages.[7] It is difficult, and in some cases impossible, to estimate these damages in advance, and hence they may be better settled by a subsequent action at law.[8]

[1] London & North-Western Rail. Co. v. Bradley, 6 Eng. Rail. Cas. 551; Brand v. City R. R., L. R. 2 Q. B. 223.

[2] Croft v. London Rail. Co., 32 L. J. (Q. B.) 113.

[3] Monongahela Nav. Co. v. Coon, 6 Pa. 379.

[4] Boston Mill Co. v. Gardner, 2 Pick. 33.

[5] Bradley v. New York R. R., 21 Conn. 294.

[6] Columbia Bridge Co. v. Geisse, 35 N. J. L. 558.

[7] Koch v. Williamsport Co., 65 Pa. 288; Spangler's Appeal, 64 Pa. 387; Patterson v. Chicago R. R., 75 Ill. 588; Stetson v. Chicago R. R., 75 Ill. 74; Hutton v. London & South-Western Rail. Co., 18 L. J. (Ch.) 345.

[8] Stetson v. Chicago R. R., 75 Ill. 74.

CHAPTER XVIII.

OF THE USES TO WHICH HIGHWAYS AND STREETS MAY BE PUT — CHANGES OF GRADE — RAILROADS IN STREETS.

§ 195. Changes of grade.
196. Dissenting views.
197. Statutes allowing damages for changes of grade.
198. Restoring property to former condition.
199. Change rendered necessary by railroad track.
200. Use of streets by railroads.
201. Railroad an improved method of use.
202. Legislative control over streets and highways.
203. Where the fee of streets is in the city or in the public.
204. Where the fee is in the adjoining owner.
205. Horse-railroads.
206. Easement of adjoining owner in the street a valuable property.
207. Inconvenience of access — Embankments in streets — Obstruction of ingress and egress to property.

§ 195. **Changes of grade.** — Land taken for a road or street is taken for all the purposes to which said street may be properly put, and subject to any changes or improvements the public authorities may see fit to make. The public authorities may determine that the grade of the street should be lowered or raised; and although injury may result to an individual from this change, yet no damages are recoverable.[1] The damage resulting from a change of grade is consequential, and, as it is a consequence of the exercise of a power granted by the state to the public authorities controlling

[1] Schattner *v.* Kansas City, 53 Mo. 162; Matter of Furman St., 17 Wend. 649; Wilson *v.* Mayor of New York, 1 Denio, 595; Waddell *v.* Mayor of New York, 8 Barb. 95; Reock *v.* Newark, 33 N. J. L. 129; Plum *v.* Morris Canal Co., 10 N. J. Eq. 256; Carr *v.* Northern Liberties, 35 Pa. 324; Green *v.* Reading, 9 Watts, 382; McLauchlin *v.* Charlotte R. R., 5 Rich. L. 583; Roll *v.* Augusta, 34 Ga. 326; Rome *v.* Omberg, 28 Ga. 46; Humes *v.* Mayor, 1 Humph. 403; Matter of Beale St., 39 Cal. 495; Shawneetown *v.* Mason, 82 Ill. 337.

the streets, the public authorities are not responsible, unless the power has been abused by an unskilful execution.[1] People who buy lots are presumed to buy them subject to any changes that may be made in the highway. The unequal burdens which owners have to bear can only be equalized by legislation.[2] An ordinance establishing a certain grade is not a contract between the city and those building, so as to entitle them to damages on a change of grade.[3] All damages for changes of this nature are presumed to have been considered in the original laying-out.[4] A city council have no power to direct the cutting-down of one street to furnish soil to fill up another street. There must be an ordinance for the improvement of the street from which the soil is taken.[5] Some cases indicate that the city would not be responsible for changes in the streets, affecting adjoining owners, although an individual proprietor adjoining, making similar improvements, might be;[6] and that there could be

[1] Taylor v. St. Louis, 14 Mo. 20; St. Louis v. Gurno, 12 Mo. 414; Smith v. Washington, 20 How. 135; Rounds v. Mumford, 2 R. I. 154; Radcliff's Executors v. Mayor of Brooklyn, 4 N. Y. 195; Matter of Ridge St., 29 Pa. 391; O'Connor v. Pittsburgh, 18 Pa. 187; Meares v. Wilmington, 9 Ired. L. 73; White v. Yazoo City, 27 Miss. 357; Simmons v. Camden, 26 Ark. 276; Macy v. Indianapolis, 17 Ind. 267; Snyder v. Rockport, 6 Ind. 237; Lafayette v. Spencer, 14 Ind. 399. For an unauthorized change in grade there is an action. In such action, the plaintiff must show that the action of the city was not authorized by charter, or was not in accordance with the provisions of the charter. Dore v. Milwaukee, 42 Wis. 108. For negligence in making change there is an action. Hendershott v. Ottumwa, 46 Iowa, 58.

[2] Callender v. Marsh, 1 Pick. 417; Rounds v. Mumford, 2 R. I. 154; Skinner v. Hartford Bridge Co., 29 Conn. 523; Louisville R. R. v. Brown, 17 B. Mon. 768.

[3] Goszler v. Georgetown, 6 Wheat. 593.

[4] Skinner v. Hartford Bridge Co., 29 Conn. 523; Radcliff's Executors v. Mayor of Brooklyn, 4 N. Y. 195; Fellowes v. New Haven, 44 Conn. 240.

[5] Delphi v. Evans, 36 Ind. 90. Earth may be removed from a street in the legitimate process of grading the streets, but may not be removed simply for the purpose of filling up other streets. Mayor of Macon v. Hill. 58 Ga. 595. If the change in the grade of the street is for the purpose of making a levee, to prevent a river from overflowing a town, and the grade is raised for such purpose only, then, under the Illinois Constitution of 1870, the owners of property damaged thereby are entitled to just compensation. Shawneetown v. Mason, 82 Ill. 337.

[6] Alexander v. Milwaukee, 16 Wis. 247.

no claim, on the part of the owner, for the lateral support of the neighboring soil.[1] These cases must proceed on the theory that, in the condemnation of the land for a street, such use was contemplated and paid for in the assessment. A city may be enjoined from establishing a grade and doing work upon a street if the proposed grade and work would not be beneficial to the public, but would render the street impassable and the place to which it leads inaccessible. Such act is a perverse abuse of the power of the city council, and the establishment of a nuisance, instead of a public highway.[2]

§ 196. **Dissenting views.** — There have been several decisions protesting against the rule laid down in the last section; but the law is too well settled, now, to further consider the question. The legislature can be appealed to, and a certain remedy given. The Supreme Court of Ohio, on general principles, have declared that damages must be allowed for injury to improvements already made, caused by changes of grades. Unimproved property must conform to grades afterward established, for the reason that the owner is presumed to purchase in view of such changes. Changes made subsequent to the improvements are for the benefit of others, and others should pay for them, and not one alone. The doctrine is conceded to be proper in England, where the acts of Parliament are supreme, but as inapplicable to this country, governed by written constitutions.[3] One decision in Illinois, that of Nevins *v.* Peoria,[4] goes a long distance in support of the same doctrine, holding that the municipality is the proprietor of the streets, and cannot use its property to the detriment of an adjoining property-

[1] Mitchell *v.* Rome, 49 Ga. 19.

[2] Armstrong *v.* St. Louis, 3 Mo. App. 151.

[3] Crawford *v.* Delaware, 7 Ohio St. 459; McCombs *v.* Akron, 15 Ohio, 474; Akron *v.* McComb, 18 Ohio, 229; Youngstown *v.* Moore, 30 Ohio St. 133. See also dissenting opinion of Judge Adams, in Thurston *v.* St. Joseph, 51 Mo. 510, and of Judge Birch, in St. Louis *v.* Gurno, 12 Mo. 414.

[4] 41 Ill. 502.

owner to any greater extent than could a private individual. Neither a private individual nor the city can turn floods of unwholesome surface-water, or sewer-water, upon adjoining property without making compensation for the use, which, in fact, constitutes a taking. If the raising of the grade destroys drainage which formerly existed, the city would be liable for failure to provide means of escape for surface-water.[1]

§ 197. **Statutes allowing damages for changes of grade.** — On account of the hardship resulting from the refusal of damages for injuries resulting from changes of grades, statutes have been passed, in a number of states, allowing damages for changes of grades.[2] These statutes have not always been construed with liberality. A statute allowing damages for an alteration of a street has been held not to justify damages for digging down an existing street.[3] The assessment of damages is similar to that for damages for laying out highways.[4] It will include damages done by

[1] Ross *v.* Clinton, 46 Iowa, 606.

[2] Columbus *v.* Woollen Mills, 33 Ind. 485.

[3] Hovey *v.* Mayo, 43 Me. 322. The Tennessee Code, §§ 1892, 1893, 1894, authorize any owner of property within corporate limits, who desires to build on or improve such lot, to apply to the corporate authorities, and require such authorities to fix and establish the grade of the street or streets on which the applicant proposes to build, that he may construct his improvements so as to conform to the grade established. It is provided that the authorities shall pay such applicant full damages that he may sustain in consequence of any subsequent change of grade of such street by said authorities, and that "said corporate authorities shall also pay to any citizen who has made permanent and valuable improvements on his property, situated on a street or streets the grade of which said authorities have neglected to establish, any material damage he may sustain in consequence of any grade which they may subsequently establish." In the case of Mayor *v.* Nichol, 59 Tenn. 388, the court say: "Such statutes are to be liberally construed in favor of the right of a citizen to be reimbursed for damages done to his property by city authorities, occasioned by works for the advantage of the general public. The citizen whose property is thus injured ought not to be required to bear the entire burden, the benefits of which he shares, perhaps, very slightly in common with other inhabitants of the city, the improvements frequently being of no personal advantage to him whatever."

[4] Sawyer *v.* Keene, 47 N. H. 178.

change of grade of a sidewalk. Sidewalks are a part of the street, and the whole damages may be assessed together.[1] The action is based alone on the statute, which is different from the common law,[2] and hence the statutory remedy is exclusive,[3] and is to be strictly construed.[4] A statute that allowed damages to improved property could not be extended to cover damages to unimproved property, but would extend to damages to property improved, as well as to the improvements thereon.[5] In assessing damages for contemplated flooding by surface-water, the damages are covered for flooding afterwards occurring, and they are not to be considered separately.[6] The right to compensation is confined to the owner of land adjoining the street which is repaired. There is no right to compensation beyond what the statute gives, and no damages can be had for injury occasioned by repairing other streets.[7] The later constitutions which require compensation for property taken or damaged for public use are construed to include damages for changes in grades, and for such changes an action will lie.[8] Damages of this nature are not due until the act of changing is completed. This differs from the case of laying-out of a highway, which appropriates the land, while the other is a declaration of an intention to use the land in a particular way.[9]

Damages, when allowed for changes in grades of streets, will be granted for changes in any portion of the width of the street. It is not essential to a claim of damages that

[1] Barker v. Taunton, 119 Mass. 392.

[2] Brown v. Lowell, 8 Metc. 172; Fernald v. Boston, 12 Cush. 574; Elder v. Bemis, 2 Metc. 599; Reock v. Newark, 33 N. J. L. 129.

[3] Cole v. Muscatine, 14 Iowa, 296; Dore v. Milwaukee, 42 Wis. 108.

[4] Terre Haute v. Turner, 36 Ind. 522; Snyder v. Rockport, 6 Ind. 237; Burlington v. Gilbert, 31 Iowa, 356; Cole v. Muscatine, 14 Iowa, 296; Dalzell v. Davenport, 12 Iowa, 437; Matter of Beale St., 39 Cal. 495.

[5] Dalzell v. Davenport, 12 Iowa, 437.

[6] Hubbard v. Webster, 118 Mass. 599.

[7] Wilbur v. Taunton, 123 Mass. 522.

[8] Elgin v. Eaton, 83 Ill. 535 (1877).

[9] Page v. Boston, 106 Mass. 84; Brown v. Lowell, 8 Metc. 172.

the change should be of the width of the entire street.[1] It is not necessary that the grading should be completed, in order to give foundation for the action. It is enough if the owner has been injured by the work done.[2]

§ 198. **Restoring property to former condition.** — The diminution in value of property on account of a change in grade includes the expense which a prudent man would reasonably incur in putting the property, with reference to the new grade, in as good a condition as it was before. There cannot be recovered the cost of the particular improvements made, or of improvements unnecessarily made, or not necessary to put the property in as good a condition as it was before.[3] Substantial changes cannot be considered, — such as moving a house back from a street, so as to leave a space in front of it, when it was not left on the street by the widening.[4] The damage is not simply to the right of lateral support of soil, but to the property in general, and will include the cost of cutting down the land, and building a basement under the house, with an interior ascent into the house, if such alterations are found reasonable and an economical means of restoring the estate to its former value.[5] While the damages to a claimant are not to be measured by the cost of the improvements or changes which he may think desirable, in order to adapt his estate to the new condition of the street, yet, in connection with evidence that a protecting wall was necessary, or that it was a reasonable and economical mode of obviating the difficulty occasioned by the change of grade, such evidence might be competent.[6]

[1] Dore *v.* Milwaukee, 42 Wis. 108.

[2] Schumacher *v.* St. Louis, 8 Mo. App. 297.

[3] Buell *v.* Worcester, 119 Mass. 372; Chase *v.* Worcester, 108 Mass. 60; The Commonwealth *v.* Boston R. R., 3 Cush. 25.

[4] Chase *v.* Worcester, 108 Mass. 60.

[5] Hartshorn *v.* Worcester, 113 Mass. 111.

[6] Bemis *v.* Springfield, 122 Mass. 110.

Power given by a charter of a railroad company to construct its road across a highway, upon condition that the same be restored to its former state, "or in a sufficient manner not to impair its usefulness," does not authorize a permanent occupation or obstruction of the highway. The word "usefulness" implies capabilities for use, and appertains to the future, as well as the present. The fact that the public travel over the road may, for the time being, be limited, does not lessen the duty to restore. A failure to restore constitutes a public nuisance, and the statute of limitations does not run against the right to abate a public nuisance. An encroachment on a public highway cannot be justified by adverse possession and enjoyment. The continuance of the nuisance is, in judgment of law, a fresh nuisance.[1]

§ 199. **Change rendered necessary by railroad track.** — The authorities of a city, having a right to make changes in grades of streets, are authorized to direct such changes to be made by a railroad company for the use of its track, and no damages will be allowed for such changes.[2] The right of a railroad to use a public street without compensation to adjoining owners will be hereafter considered.[3] The town or city would not be liable for the change,[4] or the railroad causing the same,[5] it not appearing that any portion of the land of the owner was taken,[6] unless the changes made were such as to render the lot inaccessible from the street.[7] A

[1] Little Miami R. R. v. Commissioners, 31 Ohio St. 338.

[2] Wolfe v. Covington R. R., 15 B. Mon. 404; Slatten v. Des Moines R. R., 29 Iowa, 148.

[3] *Post*, §§ 200–204.

[4] Burritt v. New Haven, 42 Conn. 174.

[5] Chapman v. Albany R. R., 10 Barb. 360.

[6] Whittieer v. Portland R. R., 88 Me. 26; Towle v. Eastern R. R., 17 N. H. 519; Benden v. Nashua, 17 N. H. 477.

[7] Pekin v. Winkel, 77 Ill. 56 (modifying Murphy v. Chicago, 29 Ill. 279); Moses v. Pittsburgh R. R., 21 Ill. 516; Regina v. Eastern Counties Rail. Co., 2 Q. B. 347. See also Pekin v. Brereton, 67 Ill. 477; Stone v. Fairbury R. R., 68 Ill. 394.

railroad, in crossing streets, must, without any special contion in the charter, restore the street to a passable condition, especially in a city, and a *mandamus* will lie to compel it so to do.[1] In order to make the crossing safe, a bridge over the track may be necessary where formerly there was a grade, or a wider bridge may be necessary; and for the failure to complete these improvements the railroad company is responsible, and not the city.[2] This reconstruction must be made within a reasonable time. The company must first break ground.[3] When a railroad company lays its track upon a public highway, it undertakes, at its peril, by some means to put the public highway in as good condition for travel as before. For its neglect to do this it may be indicted; and, if necessary to protect the public in the use of the highway, the obstruction may, by a proper order, be abated, even if the result be the destruction of the railroad at the point where it obstructs the public travel; and the company cannot purchase the right to obstruct the highway by payment of compensation to individuals.[4]

The owner of property adjacent to a street has a right to presume that the city will not permit an embankment above the established grade to remain in the street, or that it will provide proper culverts to prevent the embankment from impeding the flow of surface-water; and it does not signify that this impediment is caused by a horse-railroad track, which the city has authorized to be built.[5]

§ 200. **Use of streets by railroads.** — The use of a street by a railroad, under authority of its charter, is not a perversion of the highway from its original purpose, and the damage resulting from such obstruction is *damnum absque*

[1] Indianapolis R. R. *v.* The State, 37 Ind. 489.
[2] Burritt *v.* New Haven, 42 Conn. 174.
[3] Danville R. R. *v.* The Commonwealth, 73 Pa. 29.
[4] Gear *v.* C. C. & D. R. R., 43 Iowa, 83.
[5] Damour *v.* Lyons City, 44 Iowa, 276.

injuria.[1] The company, in the location, may lay such number of tracks as are essential to the convenient transaction of business, and, for that purpose, may make any necessary alteration in the grade or surface of the highway.[2] But where there is an entire conversion of the street by permanent structures of various kinds, to such uses as virtually block it up for all the purposes of a street, such use cannot be justified or included under a grant of a right of way. The street cannot be occupied as a depot-yard for cars to stand in while they are loaded and unloaded; nor can the track on the street be raised on embankments, so that it cannot be used by ordinary vehicles;[3] nor can the street be obstructed by earth, timber, or rails, so as to interfere with its use.[4] The company must for itself provide sufficient ground for depot purposes, and cannot use the public street for such purposes. That would be devoting the public street to purposes entirely inconsistent with the grant of a mere right of way, which must mean a way at the ordinary grade.[5] Such use could not be justified by the consent of the city authorities, although the city charter authorized the corporation to abolish streets. Such an occupation would not be the abolition of a street, but a monopoly of it. Further than that, the abolition of the street would operate in a reversion of the land to the owner, which would prevent the occupation by the railroad.[6] An

[1] Porter *v.* North Missouri R. R., 33 Mo. 128; Philadelphia & Trenton R. R., 6 Whart. 25; Tate *v.* Ohio R. R., 7 Ind. 479; Cleveland R. R. *v.* Speer, 56 Pa. 325; Mifflin *v.* Railroad, 16 Pa. 182; Snyder *v.* Pennsylvania R. R., 55 Pa. 340; Mercer *v.* Pittsburgh R. R., 36 Pa. 99; Struthers *v.* Dunkirk R. R., 7 Cent. L. J. (Pa.) 218; Louisville R. R. *v.* Brown, 17 B. Mon. 763; Slatten *v.* Des Moines R. R., 29 Iowa, 148; Parrot *v.* Cincinnati R. R., 10 Ohio St. 624; Rio Grande R. R. *v.* Brownsville, 45 Texas, 88.

[2] The Commonwealth *v.* Hartford R. R., 14 Gray, 379; Snyder *v.* Pennsylvania R. R., 55 Pa. 340.

[3] Lackland *v.* North Missouri R. R., 31 Mo. 180; Tate *v.* Ohio R. R., 7 Ind. 479; Higbee *v.* Camden R. R., 19 N. J. Eq. 276.

[4] Parrot *v.* Cincinnati R. R., 10 Ohio St. 624.

[5] Tate *v.* Ohio R. R., 7 Ind. 479.

[6] Lackland *v.* North Missouri R. R., 31 Mo. 180.

entire occupation of a street by a railroad is a nuisance.[1] The owner of land adjoining may recover damages for negligent and tortious construction, and the measure of damages will be the difference between the injury suffered by a proper and an improper construction.[2]

§ 201. **Railroad an improved method of use.** — A railroad is not an unreasonable obstruction of the free use of a street, but rather a new and improved method of using the same, germane to its principal object as a passage-way, to which the genius of the law will readily accommodate itself.[3] A prudent running of cars through a city is not a purprestur or a nuisance;[4] and unless the use operates as an obstruction or an exclusive use, it will not be interfered with. An occasional blocking of streets may be produced by long lines of wagons or coaches, and the damage or obstruction would not be different from the obstruction by trains of cars, and neither obstruction would constitute a ground for damages.[5]

§ 202. **Legislative control over streets and highways.** — The streets of cities are public highways, and, as such, under the control of the state alone, and the state may grant the use of them against the will of the municipality. The city cannot alone grant to a railroad the privilege of using its streets, as the power is in the legislature.[6] The legislature

[1] Louisville R. R. *v.* Brown, 17 B. Mon. 768. Any occupation of a street by a railroad is held to be a nuisance, in Harrington *v.* St. Paul R. R., 17 Minn. 215.

[2] Cadle *v.* Muscatine R. R., 44 Iowa, 11.

[3] Milburn *v.* Cedar Rapids, 12 Iowa, 246; Lexington R. R. *v.* Applegate, 8 Dana, 289.

[4] Chicago R. R. *v.* Joliet, 79 Ill. 25; Murphy *v.* Chicago, 29 Ill. 279; Moses *v.* Pittsburgh R. R., 21 Ill. 516.

[5] Lexington R. R. *v.* Applegate, 8 Dana, 289; Chicago R. R. *v.* Joliet, 79 Ill. 25.

[6] Carpenter *v.* Oswego R. R., 24 N. Y. 655; Davis *v.* Mayor of New York, 14 N. Y. 506; Indianapolis R. R. *v.* The State, 37 Ind. 489; Chicago R. R. *v.* Joliet, 79 Ill. 25; The State *v.* Hoboken, 35 N. J. L. 205; Attorney-General *v.*

may discontinue the use, without restraint from private citizens claiming to be interested in the continuance of the street, as adjoining owners or otherwise.[1] A highway cannot be properly used by a railroad, without legislative sanction.[2] Whether the fee in the street is in the adjoining owners or the city, yet such parties are trustees for the public use, and the public is represented by the legislature.[3] Public roads are laid out by direction of the legislative authority, exercised either directly or by delegated authority, and the state may resume control against the will of the municipality or of the owner. The owner on whose land the road has been built has no voice or control in the matter.[4] The control of city streets may be properly delegated to the city authorities, with discretion to impose conditions on the use of the street;[5] but the power is not in the city unless expressly delegated.[6] When such authority is delegated, the city may establish conditions, and reënter for the violation of them.[7] An ordinance giving the right of way to a railroad is not a contract binding on the city, so as to prevent a subsequent action by the legislature.[8] The legislature may delegate to county commissioners the power to lay out roads; and, when this is done, their decision as to the necessity and policy of opening the road cannot be interfered with by private individuals.[9] The courts have no

Passenger R. R., 32 Leg. Int. (Pa.) 238; Philadelphia & Trenton R. R., 6 Whart. 25; Savannah R. R. v. Savannah, 45 Ga. 602.

[1] Southwark R. R. v. Philadelphia, 47 Pa. 314; Gray v. Iowa Land Co., 26 Iowa, 387.

[2] Phillips v. Dunkirk R. R., 78 Pa. 177.

[3] The People v. Kerr, 27 N. Y. 188.

[4] Holcraft v. King, 25 Ind. 352.

[5] Covington Street R. R. v. Covington, 9 Bush, 127; Philadelphia & Trenton R. R., 6 Whart. 25.

[6] Polack v. Trustees, 48 Cal. 490; Davis v. Mayor of New York, 14 N. Y. 506; The State v. Hoboken, 35 N. J. L. 205; East Portland v. Multnomah County, 6 Oreg. 62.

[7] Railroad Co. v. Leavenworth, 1 Dill. 393.

[8] Indianapolis R. R. v. The State, 37 Ind. 489.

[9] Myers v. Simms, 4 Iowa, 500.

power to change the location of roads unless that power is specially conferred upon them by statute, when the proceedings are denominated special proceedings.[1]

§ 203. **Where the fee of streets is in the city or in the public.** — If the fee in the public streets has been condemned, and is in the city or the public, the legislature has entire and exclusive control; and the legislature may authorize the use of the streets by a railroad,[2] an elevated railway,[3] or a horse-railway,[4] without compensation to the adjoining owners or to the city, and against the will of both. Railroads may be authorized even to the extent of two tracks in a street.[5] The city cannot, by ordinance, compel a company occupying a street to abandon, take up, and remove a track when authority has been given by the legislature to construct the track.[6] The uses of a city street are more various than those of a country road, and one of these uses is that of a horse-railway. The use of the city streets is under the control of the legislature, even if the fee of the street is in the city, as it is in the city of New York.[7] When the fee is in the city, an action may be maintained for tres-

[1] Dewitt *v.* Duncan, 46 Cal. 342.

[2] Clinton *v.* Cedar Rapids R. R., 24 Iowa, 455 (qualifying Milburn *v.* Cedar Rapids, 12 Iowa, 246, where the court indicated that the consent of the city was necessary); Barr *v.* Oskaloosa, 45 Iowa, 275; The People *v.* Kerr, 27 N. Y. 188; Drake *v.* Hudson River R. R., 7 Barb. 508; Savannah R. R. *v.* Savannah, 45 Ga. 602; Chicago R. R. *v.* Joliet, 79 Ill. 25; Stetson *v.* Chicago R. R., 75 Ill. 74; Stone *v.* Fairbury R. R., 68 Ill. 394; Grand Rapids R. R. *v.* Heisel (Sup. Ct. Mich., 1878, not yet reported); Carson *v.* Central R. R., 35 Cal. 325; Atchison R. R. *v.* Garside, 10 Kan. 552; Davenport *v.* Stevenson, 34 Iowa, 225; Hine *v.* Keokuk R. R., 42 Iowa, 636; Ingram *v.* C. D. & M. R. R., 38 Iowa, 669. As to cases where the fee is in the adjoining owner, see the recent Iowa case, Kucheman *v.* C. C. & D. R. R., 46 Iowa, 366.

[3] Currier *v.* Elevated R. R., 6 Blatchf. 487.

[4] Kellinger *v.* Forty-second Street R. R., 50 N. Y. 206; The People *v.* Kerr, 27 N. Y. 188; Wetmore *v.* Story, 22 Barb. 414; Milhau *v.* Sharp, 15 Barb. 198.

[5] Ingraham *v.* Chicago R. R., 34 Iowa, 249.

[6] Chicago R. R. *v.* Joliet, 79 Ill. 25.

[7] The People *v.* Kerr, 27 N. Y. 188; *s. c.*, 38 Barb. 369; 37 Barb. 357.

pass for unauthorized use of streets by a railroad.[1] The owner adjoining may also claim damages for obstructing and blocking up streets.[2] While it is true that when the fee of the streets is not owned by the adjoining proprietors a railroad company has the right to take and use streets for the purpose of building and operating railroads, yet it does not follow that in so doing the road may not be so negligently built, or the street so occupied, as to create a nuisance. And, in such case, any one who suffers special damages, not common to the whole public, may recover. To entitle a party to recover such damages, it is not necessary that he should own the fee in the street.[3] In some cases, it is suggested that the city owning the fee is entitled to compensation for the additional burden.[4]

§ 204. **Where the fee is in the adjoining owner.** — In those states which consider the fee in public roads and streets to be in the adjoining owner, and not in the public or the city, the weight of authority seems to consider the use of the street, or highway, by the railroad, as an additional burden, requiring compensation.[5] The legislature may authorize the use of a street by a railroad, so as to make the entry lawful; but the use is an additional burden, and the right will not become fixed in the company until compensation is made.[6] If no remedy is provided, there is remaining

[1] Clinton *v.* Cedar Rapids R. R., 24 Iowa, 455; Patterson *v.* Chicago R. R., 75 Ill. 588. In St. Louis R. R. *v.* Capps, 67 Ill. 607, the company agreed to pay damages.

[2] Atchison R. R. *v.* Garside, 10 Kan. 552.

[3] Frith *v.* Dubuque, 45 Iowa, 406.

[4] Donnaher *v.* Mississippi, 8 Smed. & M. 649; Department of Public Parks, 18 N. Y. Sup. Ct. 386.

[5] Cooley's Const. Lim. 549; Note to Pacific R. R. *v.* Leavenworth, 1 Dill. 893; Grand Rapids R. R. *v.* Heisel (Sup. Ct. Mich. 1878, unreported), 6 Cent. L. J. 176; Sherman *v.* Milwaukee R. R., 40 Wis. 645; Ford *v.* Chicago R. R., 14 Wis. 609; Kaiser *v.* St. Paul R. R., 22 Minn. 149; South Pacific R. R. *v.* Reed, 41 Cal. 256; Kucheman *v.* C. C. & D. R. R., 46 Iowa, 366.

[6] Wager *v.* Troy Union R. R., 25 N. Y. 526; Bissell *v.* New York Central

the remedy at common law.[1] The payment of these damages may be required in advance.[2] The consent of the city to the use does not impair the owner's right to compensation.[3] When the ownership is in the adjoining owner, the city cannot enjoin the running of the railroad, while the lot-owners may.[4] A dedication of a lot for a street is for the ordinary purposes of a street, and not for use by a railroad;[5] and one railroad that has obtained a right of way cannot dispose of the right to another, to lay another track in the same street, if the laying shall seriously obstruct the street.[6] The fact that only a part of the width of the track was on the owner's portion of the street will not affect the rule of damages.[7]

§ 205. **Horse-railroads.** — The use of a street by a horse-railroad, when laid on a grade with the street, without cuttings or embankments, is a proper modification of an existing servitude. The servitude is not new because the form of vehicle is new. There is no annoyance from fire, smoke, steam-whistles, or rapid progress of trains, and it does not signify that the street-railroad has an exclusive right to use its own track when occasion requires.[8] If the railway

R. R., 23 N. Y. 61; Hinchman *v.* Paterson H. R. R., 17 N. J. Eq. 75 (overruling Morris R. R. *v.* Newark, 10 N. J. Eq. 352); Cox *v.* Louisville R. R., 48 Ind. 178; Harrington *v.* St. Paul R. R., 17 Minn. 215; Gray *v.* St. Paul R. R., 13 Minn. 315; Schurmeier *v.* St. Paul R. R., 10 Minn. 82; Kucheman *v.* C. C. & D. R. R., 46 Iowa, 366.

[1] Indianapolis R. R. *v.* McAhren, 12 Ind. 552.

[2] Sherman *v.* Milwaukee R. R., 40 Wis. 645.

[3] Ford *v.* Chicago R. R., 14 Wis. 609; Pomeroy *v.* Milwaukee R. R., 16 Wis. 640.

[4] Milwaukee *v.* Milwaukee R. R., 7 Wis. 85.

[5] Schurmeier *v.* St. Paul R. R., 10 Minn. 82; South Pacific R. R. *v.* Reed, 41 Cal. 356.

[6] South Pacific R. R. *v.* Reed, 41 Cal. 256.

[7] Blesch *v.* Chicago R. W., 43 Wis. 183.

[8] Elliott *v.* Fair Haven R. R., 32 Conn. 579; Jersey City & B. R. R. *v.* Jersey City & H. R. R., 20 N. J. Eq. 61; Hinchman *v.* Paterson H. R. R., 17 N. J. Eq. 75; Peddicord *v.* Baltimore Passenger R. W., 34 Md. 463; Savannah R. R. *v.* Savannah, 45 Ga. 602; Brown *v.* Duplessis, 14 La. An. 842; Grand Rapids

changes grades, and thereby impairs access to buildings, additional compensation must be made.[1] After a long series of cases on both sides, the Court of Appeals of New York have decided, in Craig *v.* Rochester City Railway,[2] that a horse-railway is an additional burden on a public street; that the interference is of the same nature as that of a steam-railroad, but not so great in degree; that the use of the track is exclusively in the company, for their own vehicles, and that vehicles of other kinds must give way.[3] The street-railroad has only an equal right with the public in the use of the street, with the exception that vehicles must give way in order to allow the cars to run on the track.[4] One horse-railway cannot object to the use of the street by another horse-railway, in making a crossing over its track, if done without unnecessary damage.[5]

§ 206. **Easement of adjoining owner in the street a valuable property.** — Besides the right of way which the public has of passing over a street in a city, there is a private right which passes to the owner of the lot upon the street, and as appurtenant to it, which he holds by an implied covenant that the street in front of his lot shall forever be kept open to its full width.[6] And it is immaterial whether or not the title of the owner extends to the middle of the street, as the right of action grows out of the ownership of the lot.[7] While a proper use of a street by a

R. R. *v.* Heisel (Sup. Ct. Mich. 1878, unreported), 6 Cent. L. J. 176; Clinton *v.* Horse R. W., 37 Iowa, 61; Carson *v.* Central R. R., 35 Cal. 325; Street R. W. *v.* Cumminsville, 14 Ohio St. 524.

[1] Street R. W. *v.* Cumminsville, 14 Ohio St. 524.

[2] 39 N. Y. 404.

[3] Wager *v.* Troy Union R. R., 25 N. Y. 526 (overruling and qualifying cases 39 Barb. 494; 37 Barb. 35; 35 Barb. 404, 378; 33 Barb. 420; 23 Barb. 482). The case of The People *v.* Kerr, 27 N. Y. 188, is under a peculiar statute, by which the fee of the streets of New York City is in the city.

[4] Shea *v.* Potrero R. R., 44 Cal. 414.

[5] Market Street R. R. *v.* Central R. R., 51 Cal. 583.

[6] Haynes *v.* Thomas, 7 Ind. 38; Protzman *v.* Indianapolis R. R., 9 Ind. 467.

[7] Lackland *v.* North Missouri R. R., 31 Mo. 180; Anderson *v.* Turbeville, 6

railroad, under legislative and municipal authority, may be had without payment of damages to adjoining owners, the use of the street cannot be materially interfered with.[1] This is a valuable portion of the owner's property, and if he is prevented by high embankments from ingress and egress to his lots, there is a special damage to such owner, an additional burden, for which compensation in damages must be made.[2] The street must be still capable of use as a street, and not interfered with so as to prevent its reasonable use by adjoining proprietors.[3] The authority to occupy a street must be at the company's peril, and with the understanding that injuries of this nature to private individuals must receive compensation.[4] The adjoining owner has an easement to go from his house out upon the public highway; when there, his rights in the highway are no greater than those of the general public.[5] The remedy for an obstruction to one's entering his own house is by action for the special wrong done; but for obstructing a street, when one's house was at some distance from the obstruction, the remedy is by indictment.[6]

§ 207. **Inconvenience of access — Embankments in streets — Obstruction of ingress and egress to property.** — While it may be conceded that changes of grade may be made without compensation, yet this applies to the ordinary changes which may probably be made by a city,

Coldw. 150; Elizabethtown R. R. v. Combs, 10 Bush, 382; Lexington R. R. v. Applegate, 8 Dana, 289; Cox v. Louisville R. R., 48 Ind. 178; Crawford v. Delaware, 7 Ohio St. 459; Street R. W. v. Cumminsville, 14 Ohio St. 524; Bingham v. Doane, 9 Ohio, 165.

[1] Cosby v. Owensboro R. R., 10 Bush, 288.

[2] Tate v. Ohio R. R., 7 Ind. 479; Fletcher v. Auburn R. R., 25 Wend. 462.

[3] Lexington R. R. v. Applegate, 8 Dana, 289; Cox v. Louisville R. R., 48 Ind. 178.

[4] Elizabethtown R. R. v. Combs, 10 Bush, 382; Lexington R. R. v. Applegate, 8 Dana, 289.

[5] Winterbottom v. Earl of Derby, 36 L. J. (Exch.) 194; Regina v. Metropolitan Board, L. R. 4 Q. B. 358.

[6] Macey v. Metropolitan Board of Works, 33 L. J. (Ch.) 377.

for use as a street, but would not apply to such changes as are made in streets by deep cuts or embankments erected by railroads. These injuries require compensation to adjoining property-owners.[1] Where egress and ingress is possible, no damages will be allowed although the grade is raised four or five feet;[2] but it was never understood that railroads could block up a street, so that ingress and egress to buildings would be rendered almost impossible, or so that vehicles could not stand in the street while trains were passing. The adjoining owner has a property in the street, which is as much property as the lot itself. States which allow the running of railroads in streets, without compensation, confine the giving of damages to those cases where the railroad hinders materially the ordinary use of the street, and where the property is thereby measurably depreciated in value.[3] Inconvenience of access on account of a high embankment for a bridge-approach constitutes a damage deserving of compensation.[4] Trestling in a street, for a bridge-approach, was a damage considered consequential under a constitution which allowed damages only for land taken.[5] Where the railroad occupies the street with a ditch, not leaving sufficient room for the road, the damages could not be confined to the strip actually taken, but to the loss of the entire street, and the consequent

[1] Pittsburgh R. R. *v.* Rose, 74 Pa. 362 (qualifying Henry *v.* Pittsburgh Bridge, 8 Watts & S. 85); Street R. W. *v.* Cumminsville, 14 Ohio St. 524; South Carolina R. R. *v.* Steiner, 44 Ga. 546; Moore *v.* Great Southern Rail. Co., 10 L. R. C. L. 46; Tuohey *v.* Great Southern Rail. Co., 10 L. R. C. L. 98.

[2] Newport Bridge *v.* Foote, 9 Bush, 264.

[3] Elizabethtown R. R. *v.* Combs, 10 Bush, 382. Owner may rely on grades already established. Street R. W. *v.* Cumminsville, 14 Ohio St. 524. Narrowing a street and interfering with the approach to a house are substantial injuries. Beckett *v.* Midland Rail. Co., L. R. 3 C. P. 82.

[4] Parker *v.* Boston R. R., 3 Cush. 107; Bradley *v.* New York R. R., 21 Conn. 294. In the last case, the statute provided for compensation for all damages occasioned by the improvement.

[5] Chicago R. R. *v.* McGinnis, 79 Ill. 269. Under the Constitution of Illinois of 1872, any injury to abutting owner is construed to be a proper subject of compensation. Indianapolis R. R. *v.* Hartley, 67 Ill. 439.

damages.[1] Mere inconvenience is not the subject of damages, — as, where the street is brought inconveniently near the door,[2] or where depreciation is anticipated because there will be some danger and inconvenience in crossing the track to reach the house.[3] The owner is to be paid to the extent to which the change deprives him of its legitimate use.[4] The embankments may cut off light, and air, and a passage-way, as in a case in Kentucky, where the ingress and egress to a large and valuable mill was cut off by changes in street grades. The court held the damages to be too large for the individual owner to bear, and that the city should pay; and if they could not pay, they should not impose the burden on the citizen.[5] The rule allowing damages for interference with ingress and egress conforms to that other rule of estimating damages, — that the value of the strip should be given, in its relation with the rest of the land, and considering the use to which the strip is to be put. A strip which is to be devoted to a deep cut or a high embankment is worth more to the owner, to escape the injurious use, than the simple value of the land. Any change in the use of the land taken, from that originally contemplated, would make an additional burden, and make the value of that strip still greater to the former owner. Hence, where a county road was changed into a plank-road, and in the construction thereof the road was cut so deep as to leave the house on a high elevation, impending the road, and so near as to endanger its stability and incommode the entrance to it, additional damages were allowed over those previously

[1] Hegar *v.* Chicago R. R., 26 Wis. 624.

[2] Jamison *v.* Springfield, 53 Mo. 224; Markham *v.* Mayor, 23 Ga. 402.

[3] Boston R. R. *v.* Old Colony R. R., 12 Cush. 605; Kellinger *v.* Forty-second Street R. R., 50 N. Y. 206; Glover *v.* North Staffordshire Rail. Co., 16 Q. B. 912. But see Caledonia Rail. Co. *v.* Ogilvy, 2 Macq. H. L. Cas. 229.

[4] Pekin *v.* Brereton, 67 Ill. 477 (modifying Murphy *v.* Chicago, 29 Ill. 279).

[5] Louisville *v.* Rolling-Mill Co., 3 Bush, 416; Keasy *v.* Louisville, 4 Dana, 154. Diminution of light in a building is also to be considered. Eagle *v.* Charing Cross Rail Co., 36 L. J. (C. P.) 297; Beckett *v.* Midland Rail. Co., L. R. 3 C. P. 82.

granted for a road at grade.[1] Depreciation to mill property, caused by a railroad running alongside of the public road, which would lay between the railroad and high bank of a river, is to be considered, where the access to the mill was rendered dangerous and the custom of the mill was injured.[2]

[1] Williams *v.* Natural Bridge Plank-Road, 21 Mo. 580
[2] West Pennsylvania R. R. *v.* Hill, 56 Pa. 460.

CHAPTER XIX.

OF THE CONTROL OF RAILROAD COMPANIES OVER RIGHTS OF WAY, AND OF THEIR DUTIES IN RELATION THERETO.

§ 208. Railroad to have exclusive control over right of way.
209. Telegraph line an encroachment — Railroad company may erect telegraph line.
210. Materials in right of way.
211. Track need not be in centre of right of way — Obstruction of private ways.
212. Fencing.
213. Farm-crossings.
214. Failure of company to make crossings.
215. Bridges over cuts — Ditches.

§ 208. **Railroad to have exclusive control over right of way.** — The property of a railroad, although taken for public use, and to a certain extent under the control of the public, is private property as far as the management is concerned. Any use which is inconsistent with the efficient management of the road, or to its complete dominion over its right of way, is a taking of private property, and unauthorized, unless by virtue of a legislative act which provides compensation.[1] The right of the railroad to repair and change the structure of its road, and to use the materials found in its right of way, requires an exclusive occupation and control,[2] and it is no answer that the railroad did not need all the right of way for its own purposes.[3] Land-owners cannot enter on land, for the purpose of cutting herbage or turf,[4] or of pasturing cattle on the right of way,[5]

[1] Atlantic Telegraph Co. *v.* Chicago R. R., 6 Biss. 158.
[2] Jackson *v.* Rutland R. R., 25 Vt. 150.
[3] Burnett *v.* N. & C. R. R., 4 Sneed, 528.
[4] Troy R. R. *v.* Potter, 42 Vt. 265; Connecticut River R. R. *v.* Holton, 32 Vt. 43.
[5] Jackson *v.* Rutland R. R., 25 Vt. 150; Chicago R. R. *v.* Patchin, 16 Ill.

or of flowing right of way, or using the embankment of a railroad for the wall of a dam.[1] The inconvenience of having men, teams, and cattle on the right of way is not to be tolerated, and the danger to the travelling public should be considered. The removal of turf renders the road liable to dust, which is annoying to travellers, and hence the company may promote the growth of turf; and the removal of the growth of turf by an adjoining owner would be a trespass. The railroad company may trim a hedge which encroaches on its right of way.[2] The railroad acquires, by its condemnation, either an easement or a several estate, and not one in common with the tenants in common over whose land the railroad is situated.[3] The necessity of laying a town-way over a railroad should appear to the county commissioners to be plain and manifest; and the company may take advantage of errors in proceedings.[4]

§ 209. **Telegraph line an encroachment — Railroad company may erect telegraph line.** — The use by a telegraph company of the right of way of a railroad, for the purposes of erection and maintenance of a telegraph line, is an encroachment on the exclusive rights of the railroad.[5] The railroad might be crowded out of its right of way by telegraph lines, and might be interfered with in necessary repairs and maintenance of its road-bed. The construction of a telegraph line involves, necessarily, the actual taking of property, and its exclusive occupation. The owner of the land can have no claim for damages because the railroad company constructs a telegraph line upon its right of way. Such use by the railroad company is a proper use of its right

198. And if cattle are injured, the railroad company is not responsible. Munger *v.* Tonawanda R. R., 4 N. Y. 349.

[1] Lake Superior R. R. *v.* Greve, 17 Minn. 322.

[2] Toledo R. R. *v.* Green, 67 Ill. 199.

[3] Weston *v.* Foster, 7 Metc. 297.

[4] The Commonwealth *v.* Haverhill, 7 Allen, 523

[5] Atlantic Telegraph Co. *v.* Chicago R. R., 6 Biss. 158; South-Western R. R. *v.* Southern Telegraph Co., 46 Ga. 43.

of way; and it does not signify that the line was erected by a telegraph company for the joint use of such company and the railroad.[1]

§ 210. **Materials in right of way.** — The corporation the condemning land is entitled to the whole or any portion of materials, stone, or gravel excavated on one portion of the land, to be used in the proper construction or repair of any other portion thereof.[2] Otherwise, if only a license to use the right of way has been given.[3] The company may cut down the trees in the right of way. The burden of showing that the cutting was not necessary is on the owner. The presumption is that the officers of the railroad are exercising a proper discretion. The removal of trees may be necessary to prevent obstruction of view.[4] The entire timber may not be destroyed simply because the company deems such course necessary and convenient. The company is to use materials only for the purposes required in the statute. Unless necessary for the construction of the road, the proprietor may remove the timber and use it as his own.[5] Construction of the road means making the road-bed. Timber in the road-bed could not be used as firewood by the company.[6] The minerals in the land belong to the owner, and he may remove them if it will not endanger the railroad.[7] The materials cannot be removed, and sold to third parties. This would be an abuse of the power of condemnation, to condemn for the purpose of selling again; and when materials are so sold, the owner may recover their

[1] Telegraph Co. *v.* Rich, 19 Kan. 517.

[2] Chapin *v.* Sullivan R. R., 39 N. H. 564; Aldrich *v.* Drury, 8 R. I. 554; Taylor *v.* New York R. R., 88 N. J. L. 28; Preston *v.* Dubuque R. R., 11 Iowa, 15. *Contra*, as to gravel, New York R. R. *v.* Gunnison, 8 N. Y. Sup. Ct. 496.

[3] Chapin *v.* Sullivan R. R., 39 N. H. 564.

[4] Brainard *v.* Clapp, 10 Cush. 6.

[5] Taylor *v.* New York R. R., 88 N. J. L. 28; Preston *v.* Dubuque R. R., 11 Iowa, 15.

[6] Preston *v.* Dubuque R. R., 11 Iowa, 15.

[7] Hasson *v.* Oil Creek R. R., 8 Phila. 556.

value.[1] Trespass will lie for taking materials outside of the right of way, unless such taking is pursued under the statutory power of condemning materials.[2]

§ 211. **Track need not be in centre of right of way — Obstruction of private ways.** — The strip of land used as a right of way is under the control of the company, and they may locate their track in such portion of the right of way as they may deem proper. In conveyances, the owner should specify if he desires a particular location; otherwise, the company may use their discretion.[3] In a public street, the track may be located on one side of a street, but a change of location to the other side would require the damages to be paid to the owner injured by the proximity.[4]

Land taken by a railroad may be used by the company in the erection of buildings or other structures, and hence may obstruct a private way across the lands so taken.[5]

§ 212. **Fencing.** — The expense of new fencing required by the taking of the land should be borne by the party condemning. This liability does not impose a contract upon the party condemning, but the expense should be included in the land damages,[6] or the obligation may be defined by the legislature. It has been further held that the compensation should include the cost of maintaining the fence.[7] The difficulty of estimating the cost of maintaining fences has

[1] Aldrich *v.* Drury, 8 R. I. 554; Taylor *v.* New York R. R., 38 N. J. L. 28.

[2] Crawfordsville R. R. *v.* Wright, 5 Ind. 252.

[3] Munkers *v.* Kansas City R. R., 60 Mo. 334; Stark *v.* Sioux City R. R., 43 Iowa, 501.

[4] Central R. R. *v.* Hetfield, 18 N. J. Eq. 323.

[5] Boston Gas-Light Co. *v.* Old Colony R. R., 14 Allen, 444.

[6] Vandegrift *v.* Delaware R. R., 2 Houst. 287; Greenville R. R. *v.* Partlow, 5 Rich. L. 428; Baltimore R. R. *v.* Lansing, 52 Ind. 229; Montmorency Road *v.* Rock, 41 Ind. 264; Whitewater R. R. *v.* McClure, 29 Ind. 536; Milwaukee R. R. *v.* Eble, 4 Chand. 72; Winona R. R. *v.* Denman, 10 Minn. 267; Carpenter *v.* Sims, 3 Leigh, 675; Tonica R. R. *v.* Unsicker, 22 Ill 221.

[7] St. Louis R. R. *v.* Mitchell, 47 Ill. 165.

led some courts to deny that doctrine, and hold that the cost of maintaining the fence for an indefinite period of time should not be included, but only for the changes rendered necessary,[1] and not for annual damages corresponding to those allowed for overflowing lands.[2] The owner is not compelled to expend the money he receives in making a fence.[3] The fencing should be reasonable fencing;[4] not an iron fence or stone wall, or the fence which the owner chose to construct, but reasonable fencing, such as an ordinary owner might put up.[5] Hence the cost of fencing has been refused when the fences were not necessary, or had not been formerly used, — as, where the land was uncultivated.[6] Evidence should be offered of the cost of fencing, and in the absence of such evidence the jury must omit damages for fencing.[7] The owner has time in which to remove his fences. If he removes them voluntarily, his vendee cannot replace them and claim the same time to remove.[8] The expense of removing and resetting a fence which the owner had erroneously built on the right of way, when the damages for taking the right of way had already been assessed, cannot be allowed to the owner. He should have put the fence on the proper line.[9] The owner cannot occupy the lands of the railroad company with fences,[10] and the law relating to partition fences does not apply.[11] The company is not necessarily an adjoining owner in fee, so as to require it to join in erecting a fence. Until the company does erect a fence, it is not negligence in the owner to allow

[1] Evansville R. R. *v.* Fitzpatrick, 10 Ind. 120; Rock Island R. R. *v.* Lynch, 23 Ill. 645.

[2] Henry *v.* Dubuque R. R., 2 Iowa, 288.

[3] Chesapeake R. R. *v.* Patton, 6 W. Va. 147.

[4] Henry *v.* Dubuque R. R., 2 Iowa, 288.

[5] Bland *v.* Hixenbaugh, 39 Iowa, 532.

[6] First Parish *v.* Plymouth, 8 Cush. 475; Raleigh R. R. *v.* Wicker, 74 N. C. 220; North-East R. R. *v.* Sineath, 8 Rich. L. 185.

[7] Peoria R. R. *v.* Birkett, 62 Ill. 332.

[8] Hunter *v.* Jones, 18 Minn. 307.

[9] Holton *v.* Butler, 22 Iowa, 557.

[10] Alton R. R. *v.* Baugh, 14 Ill. 211.

[11] Henry *v.* Dubuque R. R., 2 Iowa, 288.

his cattle to be on his adjoining land, from whence they may stray on the track.[1] In Illinois, there is a statute giving an action by the railroad company against the owner for failing to fence.[2] In some states, the statute makes it compulsory upon the company to fence the track. In such case, the jury cannot consider, in the damages, the probability that the company would not maintain the fence. The remedy under the statute would be sufficient.[3] In New York, it has been suggested that the railroad should bear one-half of the cost of fencing, as the fence is for the mutual benefit of both owner and railroad.[4] In Pennsylvania, the cost of fencing is not allowed, but the jury may consider, in damages, the depreciation caused by having to provide additional fences.[5] The claim for compensation can best be sustained on the rule requiring the condemning party to pay not only the value of the strip taken, but its value in relation to the land not taken. But for the taking no new fencing would be necessary. Hence the value of the strip over and above the value of the land in the strip is the cost of the additional fencing rendered necessary.

If the road, whether a railroad or public road, is laid out on the line of the owner's land, and no land is taken, there can be no damages for compelling the owner to maintain the whole of a fence, the expense of one-half of which, only, was formerly borne by him.[6]

§ 213. **Farm-crossings.** — It is doubtful whether railroads are compelled to construct farm-crossings; but if constructed, they become the property of the land-owner, and

[1] Quimby *v.* Vermont Central R. R., 28 Vt. 887.

[2] St. Louis R. R. *v.* Mitchell, 47 Ill. 165.

[3] Jones *v.* Chicago R. R., 68 Ill. 380; Winona R. R. *v.* Waldron, 11 Minn. 515.

[4] Matter of Rensselaer R. R., 4 Paige, 553. Doubted in Henry *v.* Dubuque R. R., 2 Iowa, 288.

[5] Delaware R. R. *v.* Burson, 61 Pa. 369.

[6] The People *v.* Supervisors, 19 Wend. 102; Hoag *v.* Switzer, 61 Ill. 294. This last case was decided before the Constitution of Illinois of 1872, which would allow damages for such an injury.

cannot be removed except by his consent, or when necessary for the improvement of the road. Where the railroad company make the crossings at their own expense, no damages for them should be allowed to the owner.[1] The erection of farm-crossings is under the control of the railroad, and the owner has no right to make them when and where he pleases. His convenience must yield to the public safety.[2] The company are bound to erect crossings according to the plan of their road, because on that basis it is presumed that the damages have been assessed. The company is not bound to construct bridges or viaducts, except as stated on their plan.[3] Crossings include crossings under as well as over a railroad, and if a crossing under is necessary and proper, the jury are bound to assess the damages, on the theory that the proper crossings should be forever maintained.[4] The owner is entitled to crossings when the railroad separates the house from the highway; and the crossings should be suitable, and heavy gates are not of that nature.[5]

§ 214. **Failure of company to make crossings.** — The remedy for failure to make crossings is, to sue for penalty given by statute, or by bill in equity to compel the construction, but not by assessment of damages under the statute.[6] For failure to make crossings over public roads, the remedy is by indictment.[7] Where the company is compelled by statute to make crossings, the interest and convenience of the owner should be first considered; and if the places are not designated on the map, it is presumed that the company

[1] March *v.* Portsmouth R. R., 19 N. H. 372.

[2] Connecticut River R. R. *v.* Holton, 32 Vt. 43; Presbrey *v.* Old Colony R. R., 103 Mass. 1; Alton R. R. *v.* Baugh, 14 Ill. 211.

[3] Kyle *v.* Auburn R. R., 2 Barb. Ch. 489.

[4] St. Paul R. R. *v.* Murphy, 19 Minn. 500.

[5] Gray *v.* Burlington R. R., 37 Iowa, 119.

[6] Vermont R. R. *v.* Franklin, 10 Cush. 12.

[7] Brainard *v.* Connecticut R. R., 7 Cush. 506.

will make them in their proper places for the owner, and for a failure to make them in proper and convenient places the company would be liable in damages.[1] The company cannot be compelled, without compensation, to make new crossings for streets instituted after the condemnation has been had.[2] The English Lands Clauses Consolidation Act provides that owners and occupiers of adjoining lands may cross the track of the railroad at any point, until the company provides a communication, without interfering with the operation of the railway.[3]

§ 215. **Bridges over cuts — Ditches.** — If the railroad company is compelled by statute to erect bridges over cuts, it is error to assess as part of the damages the cost of a bridge over the cut. The duty of the railroad company can better be enforced in another manner.[4]

The railroad company cannot be compelled to make ditches, but damages may be allowed for the expense of ditches rendered necessary by the construction of the railroad.[5]

[1] Wheeler *v.* Rochester R. R., 12 Barb. 227.
[2] Illinois Central R. R. *v.* Bloomington, 76 Ill. 447.
[3] 8 Vict., c. 20, § 74.
[4] Philadelphia R. R. *v.* Trimble, 4 Whart. 47.
[5] St. Louis R. R. *v.* Mollett, 59 Ill. 285.

CHAPTER XX.

OF THE VARIOUS DAMAGES PRESUMED TO BE INCLUDED IN THE ASSESSMENT.

§ 216. All damages presumed to have been considered in the assessment.
217. Damages arising afterward — Unforeseen damages.
218. Assessment after construction of the improvement.
219. Change in plan after assessment.
220. No compensation for damages caused by negligent or tortious acts.
221. Damages while land is unlawfully occupied.
222. Trespasses on lands adjoining.
223. Value of erections on land condemned — Ownership of buildings.
224. Continuing buildings already commenced.
225. Buildings on streets not laid out — Dedication by plat.

§ 216. **All damages presumed to have been considered in the assessment.** — All elements of damages should be presented to the commissioners or jury assessing the damages. The appraisement embraces all past, present, and future damages which the improvement may thereafter reasonably produce.[1] Damages resulting from tearing down fences, or expense in construction of new fences, or, in fact, any damage not resulting from negligent or unskilful construction, is presumed to be included in the assessment.[2] The fact that the land over which the road passed was mineral land is presumed to have been considered, and

Sawyer *v.* Keene, 47 N. H. 178; Waterman *v.* Connecticut R. R., 30 Vt. 610; Furniss *v.* Hudson River R. R., 5 Sandf. 551; Van Schoick *v.* Delaware Canal, 20 N. J. L. 249; Trenton Water Co. *v.* Chambers, 13 N. J. Eq. 199; Chesapeake Canal *v.* Grove, 11 Gill & J. 398; Baltimore R. R. *v.* Magruder, 34 Md. 79; Montmorency Road *v.* Stockton, 43 Ind. 328; Lafayette Plank-Road *v.* New Albany R. R., 13 Ind. 90; Missouri R. R. *v.* Haines, 10 Kan. 439; Caledonia Rail. Co. *v.* Lockhart, 3 Macq. H. L. Cas. 808; Lawrence *v.* Great Northern Rail Co., 16 Q. B. 643; Perley *v.* Railroad, 57 N. H. 212.

[2] Clark *v.* Hannibal R. R., 86 Mo. 202; Sabin *v.* Vermont Central R. R., 25 Vt. 363; Steele *v.* West Lock Nav. Co., 2 Johns. 283; Pittsburgh R. R. *v.* Gilleland, 56 Pa. 445; Tucker *v.* Erie R. R., 27 Pa. 281.

that the corporation condemning would be entitled to the excavations made by it, whether or not they were necessary in the construction of the road.[1] When the statute allows damages for inconveniences resulting from cuttings and embankments, which render passage to and from different parts of a farm difficult, such damages are presumed to have been considered.[2] The assessment embraces damages by causing a spring to disappear on account of an excavation, notwithstanding, as a matter of fact, the damages could not have been anticipated.[3] Although rights of excavating and blasting are included in the rights obtained by condemnation of a right of way, yet when the company comes with its application for a right of way across land which is crossed by a stream of water, the company does not indicate to the owner, by necessary implication, that it wants to take and pay for the privilege of diverting the stream, when such diversion would destroy a mill-privilege or the land-owner's stock-water. It cannot be known to the commissioners, in ordinary cases, that a diversion of the stream will be necessary; for the question of diverting a stream, and filling to save the cost of bridging, is a question of civil engineering, and because there is no necessity, in any case, of diverting a stream to save bridging, except in view of greater economy and safety. In order to allow the diversion of a stream, there should have been an assessment with a view to finding the damages which would accrue on such diversion.[4]

§ 217. **Damages arising afterward — Unforeseen damages.** — The damages estimated in the assessment are those resulting from the construction of the road on the land

[1] Evans v. Haefner, 29 Mo. 141; Baker v. Johnson, 2 Hill, 342.

[2] Mason v. Kennebec R. R., 31 Me. 215. The damage should be estimated. There should not be a determination as to future access to the land so cut off. Ware v. Regent's Canal Co., 28 L. J. (Exch.) 145.

[3] Aldrich v. Cheshire R. R., 21 N. H. 359; Lafayette Plank-Road v. New Albany R. R., 18 Ind. 90.

[4] Stodghill v. Chicago R. R., 43 Iowa, 26.

taken from the owner, but cannot include damages resulting from construction on the land of others. If the public improvement removes, on the land of others, a natural barrier which previously prevented the flooding of water upon the land of plaintiff, there is a valid claim for damages. The fact that the parties making the assessment did not, or could not, anticipate the damages, does not exclude the right to damages.[1] Such damages may be recovered by common-law action, if not within the purview of the parties making the assessment.[2] The fact that the legislature did not provide for damages arising afterward, does not prove that the damages are not recoverable. The omission would indicate that the legislature left that to be covered by a common-law action.[3] The fact that the loss was not suffered within a short time after the construction of the road, does not make it any the less a taking. The taking must depend on the injurious effect, and not on the length of time necessary to produce the effect.[4] The limitation on bringing of actions would run, although such damages could not have been foreseen.[5] This doctrine is denied in the earlier case of Heard *v.* Middlesex Canal,[6] where Chief Justice Shaw holds that the damages must be assessed once for all, and cannot be determined by any after use, and that subsequent suits should not be sustained. The limitation against such actions would be the ordinary limitation on actions, and not the special one provided by statute on actions for assessing damages.[7] The English doctrine is, that the ordinary damage is included, but that "any future extraordinary

[1] Eaton *v.* Boston & Maine R. R., 51 N. H. 504.
[2] *Ibid.;* Calhoun *v.* Palmer, 8 Gratt. 88; Whitworth *v.* Puckett, 2 Gratt. 528.
[3] Wabash Canal *v.* Spears, 16 Ind. 441.
[4] *Ibid.;* Eaton *v.* Boston & Maine R. R., 51 N. H. 504.
[5] Call *v.* Middlesex, 2 Gray, 232.
[6] 5 Metc. 81.
[7] Wabash Canal *v.* Spears, 16 Ind. 441 (qualifying Lafayette Plank-Road *v.* New Albany R. R., 13 Ind. 90).

damage is not intended to be included in it."[1] For a new description of injury, not considered in the first assessment, there may be an additional claim.[2] When the character and extent of a contingent future injury is capable of being ascertained, the amount of compensation should be ascertained once for all.[3]

§ 218. **Assessment after construction of the improvement.** — If, pending an appeal from commissioners to a jury, the road is completed, the jury may see whether the road has been constructed in a proper manner, and what is the actual damage from running of the road. The damages are assessed as of the time of the taking, but the jury, with the light of the construction, may determine more certainly what the damage really was then.[4] The same rule would apply where damages were assessed after the taking and construction.[5]

§ 219. **Change in plan after assessment.** — When damages have been assessed according to a certain plan, which would cause certain damages, it would be inequitable to allow the adoption of a new plan, more injurious to the owner, without providing for a new assessment.[6] If the company build in a different manner from the plan proposed, and according to which damages have been assessed, they may be restrained from construction until the additional damages are assessed.[7] If the proceedings are not concluded, such errors might be set aside and remedied in

[1] Lancashire Rail Co. *v.* Evans, 15 Beav. 322; Lawrence *v.* Great Northern Rail Co., 16 Q. B. 643.

[2] Rex *v.* Leeds & Selby Rail Co., 8 Ad. & E. 683.

[3] Croft *v.* London, etc., Rail Co., 32 L. J. (Q. B.) 113.

[4] Dearborn *v.* Boston R. R., 24 N. H. 179.

[5] Watson *v.* Pittsburgh R. R., 37 Pa. 469; Nash *v.* Upper Appomattox County, 5 Gratt. 332; Greenville R. R. *v.* Nunnamaker, 4 Rich L 107.

[6] Boyd *v.* Negley, 53 Pa. 387.

[7] Carpenter *v.* Easton R. R., 26 N. J. Eq. 168; *s. c.*, 24 N. J. Eq. 249; Jacksonville R. R. *v.* Kidder, 21 Ill. 131.

a direct proceeding, but not collaterally; and it does not signify that incorrect instructions had been given on the assessment. The remedy for those errors would be by appeal, and not by a separate action.[1] Errors in the commissioners' report, even when founded on misrepresentations of the company, cannot be remedied in a collateral action, or treated as being otherwise than complete.[2] When the damages have been settled by agreement, and afterward there is a change of plan, involving more damages, the owner may demand an assessment under the statute,[3] and the same rule would apply if damages were assessed by regular proceedings.[4] There may also be a recovery on the case, or on the implied undertaking to construct according to the plan.[5]

§ 220. **No compensation for damages caused by negligent or tortious acts.** — The damages which are assessed under condemnation proceedings are only those arising from the skilful and proper construction and the lawful use of the public improvement.[6] Damages arising from unsafe appliances or careless construction of public improvements give a right of action in favor of the party injured, and the fact that the damages assessed had been paid would be no defence. The parties making the assessment cannot contemplate in their assessment that the company will use

[1] Van Schoick *v.* Delaware Canal, 20 N. J. L. 249.

[2] Butman *v.* Vermont Central R. R., 27 Vt. 500.

[3] Bertsch *v.* Lehigh Co., 4 Rawle, 130.

[4] Peoria R. R. *v.* Birkett, 62 Ill. 332.

[5] St. Louis R. R. *v.* Mitchell, 47 Ill. 165; Jacksonville R. R. *v.* Kidder, 21 Ill. 131.

[6] McCormick *v.* St. Joseph R. R., 57 Mo. 433; Jackson *v.* Portland, 63 Me. 55; Bangor R. R. *v.* McComb, 60 Me. 290; Dodge *v.* Commissioners of Essex, 3 Metc. 380; Bailey *v.* Mayor of New York, 3 Hill, 531; Delaware Canal *v.* Lee, 22 N. J. L. 243; Caledonia Rail. Co. *v.* Colt, 3 Macq. H. L. Cas. 833; Turner *v.* Sheffield Rail. Co., 3 Eng. Rail. Cas. 222; Lawrence *v.* Great Northern Rail. Co., 6 Eng. Rail. Cas. 656, 16 Q. B. 643; Brine *v.* Great Western Rail. Co., 31 L. J. (Q. B.) 101; Southampton Bridge Co. *v.* Southampton, 21 L. J. (Q. B.) 41.

unsafe appliances or abuse its powers.[1] All such damages are to be recovered in other forms of action.[2] Damages for failure to remove stones thrown upon land by blasting should be obtained by an action at law.[3] The construction of public improvements in a manner to cause unnecessary damages leaves to the owner his common-law action, in which the entire damages, past, present, and prospective, should be settled,[4] and for such damages he cannot apply to the commissioners assessing damages to consider his claim.[5] These public works must be maintained in a skilful and perfect manner, and damages resulting from negligence in maintenance are not included in the original compensation.[6] An action will lie for damages resulting from a defective bridge or culvert, which caused water to accumulate and

[1] Mason *v.* Kennebec R. R., 30 Me. 215; McCormick *v.* St. Joseph R. R., 57 Mo. 433; Dearborn *v.* Boston R. R., 24 N. H. 179; Hatch *v.* Vermont Central R. R., 25 Vt. 49; Lowell *v.* Boston R. R., 23 Pick. 24; Spencer *v.* Hartford R. R., 10 R. I. 14; Mayor *v.* Bailey, 2 Denio, 433; Huyett *v.* Philadelphia R. R., 23 Pa. 378; Southside R. R. *v.* Daniel, 20 Gratt. 344; Selma R. R. *v.* Keith, 58 Ga. 178; King *v.* Iowa Midland R. R., 34 Iowa, 458; Fleming *v.* Chicago R. R., 34 Iowa, 353; Oregon R. R. *v.* Barlow, 3 Oreg. 311; Jones *v.* Festiniog Rail. Co., L. R. 3 Q. B. 733.

[2] Perry *v.* Worcester, 6 Gray, 544; Terre Haute R. R. *v.* McKinley, 33 Ind. 274; Regina *v.* Bristol Rail. Co., 2 Eng. Rail. Cas. 99; Turner *v.* Sheffield Rail. Co., 10 Mee. & W. 425; Brine *v.* Great Western Rail. Co., 31 L. J. (Q. B.) 101; Manser *v.* North-Eastern Rail. Co., 2 Eng. Rail. Cas. 380; Lawrence *v.* Great Northern Rail. Co., 16 Q. B. 643.

[3] Whitehouse *v.* Androscoggin R. R., 52 Me. 208; Sabin *v.* Vermont Central R. R., 25 Vt. 363.

[4] Fowle *v.* Northampton Co., 112 Mass. 334; Proprietors of Locks *v.* Nashua R. R., 10 Cush. 385.

[5] Waterman *v.* Connecticut R. R., 30 Vt. 610; Perry *v.* Worcester, 6 Gray, 544. There should be no damages allowed against a railroad company because the construction of the railroad would obstruct a public highway. The railroad company should be liable in just such damages as would naturally and fairly result from a careful and proper construction of the road, according to law. For an obstruction the company would be liable to indictment, and the payment of the damages assessed would confer no right. Gear *v.* C. C. & D. R. R., 43 Iowa, 83.

[6] Morris Canal Co. *v.* Ryerson, 27 N. J. L. 457; Pittsburgh R. R. *v.* Gilleland, 56 Pa. 445; Waterman *v.* Connecticut R. R., 30 Vt. 610; Perry *v.* Worcester, 6 Gray, 544.

flow back on lands above.[1] Separate actions must be instituted for failure of the railroad company to construct cattle-guards, as required by law, damage having accrued to the owner thereby.[2] The damages arising from improper construction accrue to the owner who owns the property at the time the injury is suffered, who may be the vendee of the owner at the time of the taking.[3] Damages resulting from a skilful execution of public work are lawful, although injurious to individuals, and are not the subject of actions of tort, but are to be recovered by the statutory proceedings.[4]

§ 221. **Damages while land is unlawfully occupied.** — The damages occasioned while land is unlawfully occupied are not to be considered by the tribunal assessing damages. The commissioners are to assess for future damages, and not for trespasses already committed, or for rights of action already accrued.[5] When a company exceeds its chartered rights, — as, for instance, occupying its right of way, which was properly used for a team-road for wagons, by passenger trains propelled by locomotive engines, — it will be held to a greater degree of responsibility, and will be liable for fires occasioned by sparks, although no negligence is shown. Damages for such use are not included in the assessment.[6]

§ 222. **Trespasses on lands adjoining.** — As the corporation condemning would be authorized only to use the land condemned, and the materials on it, any use of land adjoining — as, for a cart-way to remove materials — would be unauthorized, and hence such damages would not be

[1] Mellen *v.* Western R. R., 4 Gray, 301; Rowe *v.* Granite Bridge Co., 21 Pick. 344; King *v.* Iowa Midland R. R., 34 Iowa, 458.

[2] King *v.* Iowa Midland R. R., 34 Iowa, 458.

[3] Southside R. R. *v.* Daniel, 20 Gratt. 344.

[4] Perry *v.* Worcester, 6 Gray, 544; Mellen *v.* Western R. R., 4 Gray, 301.

[5] Blodgett *v.* Utica R. R., 64 Barb. 580. See *ante*, § 90.

[6] Jones *v.* Festiniog R. R., L. R. 3 Q. B. 733.

included in the report of the commissioners, and would properly be recoverable by a separate action at law.[1] Only the damage to the land through which the improvement runs is to be recovered before the commissioners. If, however, the corporation, at a point distant from plaintiff's land, diverts a stream so as to cause water to flow back on his land, an action will lie.[2] If the corporation has power to take stone from land adjoining, it would have power to hew it on land not taken.[3] Damages for draining water upon land adjoining the right of way are not included in the assessment of damages, and must be considered separately. The corporation, in order to protect itself from actions of trespass, should see to it that the engineers in charge of the work ascertain the land necessary for drainage purposes, and should condemn the same.[4]

§ 223. **Value of erections on land condemned — Ownership of buildings.** — When land is condemned, the condemnation carries with the land all the erections upon it, including buildings, fences, gravel, stone or wood paving, planks, flag-stones, bridges, culverts, guard or lamp posts, etc. It does not signify that these have been used for a private use of a similar character, — as, where a private way is taken for a public way.[5] The owner cannot remove the property from the land, and it is irregular to deduct from the damages the value of the property removed; but, as the deduction worked substantial justice, the court, in one case, refused to disturb the judgment.[6] The condemnation of a part of a building does not carry with it the materials of the rest of the building.[7] If the owner appropriates the

[1] Sabin *v.* Vermont Central R. R., 25 Vt. 363.
[2] Delaware Canal *v.* Lee, 22 N. J L. 243; Eaton *v.* Boston & Maine R. R., 51 N. H. 504.
[3] Vermont R. R. *v.* Baxter, 22 Vt. 365.
[4] The State *v.* Armell, 8 Kan. 288.
[5] Ford *v.* Commissioners, 64 Me. 408.
[6] Mississippi River Bridge *v.* Ring, 58 Mo. 491.
[7] Bennett *v.* Boyle, 40 Barb. 551.

débris of a building taken, the value of the *débris* must be deducted from the damages to the building as such.[1] In the adjustment, the owner may be allowed the expense of removing any improvements; and in such case the owner is entitled to the materials of buildings, or their proceeds.[2] No suit can be instituted against the owner of the land for removing trees from the land, until the condemnation proceedings are perfected.[3]

§ 224. **Continuing buildings already commenced.** — The mere fact that proceedings are pending to open or widen a street does not prevent the owner from using his property or obtaining benefit from it. The proceedings may be discontinued, and the owner thus lose the use of his land. The damages are to be based on the value of premises at the time commissioners may make their view. The public are not bound to accept the improved property, and are not further bound by their application for commissioners. The appointment of commissioners does not operate as a *lis pendens*. Besides, a *lis pendens* does not prevent the owner from improving his property. This matter was thoroughly considered in the case of Matter of Wall Street,[4] where a bank had commenced a valuable building before proceedings had been commenced, and the bank was allowed for the building erected up to the time of the taking.

§ 225. **Buildings on streets not laid out — Dedication by plat.** — Property cannot be taken from the owner, except on compensation. Until taken, it remains his own, to use as he pleases. When taken, it should be paid for according to the value at the time of taking, which would include the cost of erections on it. The case of Furman

[1] Lafayette R. R. *v.* Winslow, 66 Ill. 219.
[2] Peters *v.* Mayor, 15 N. Y. Sup. Ct. 405.
[3] Rider *v.* Striker, 63 N. Y. 136.
[4] 17 Barb. 617.

Street,[1] decided by Judge Bronson, establishes a doctrine, that if the city had adopted a map designating certain streets to be afterward laid out, then the owner building on any such street thereafter should not be entitled to compensation for any such building,[2] notwithstanding the order for opening the street was not made until seventeen years after the adoption of the map. The doctrine might properly apply to a case where the owner had subdivided his land, and filed a plat in a public office, designating streets, and where he had sold lots in conformity with such plat; and in such cases the owner, or his successors, have been held entitled only to nominal damages for streets taken, or for any erections thereon.[3] Any interference, however, with the right of the owner to use his property as he pleases is certainly unauthorized, unless compensation is made. A plan of proposed streets cannot prevent the owner from using his own property and improving it; and not to allow for improvements made before the taking, would operate as a taking without compensation.[4] The city may change its plan, and the lot-owner cannot hold the city to a particular plan. There is no mutuality, and no contract binding either party.[5]

[1] 17 Wend. 649.

[2] This doctrine is approved in District of Pittsburgh, 2 Watts & S. 320.

[3] Wyman *v.* Mayor of New York, 11 Wend. 487; Livingston *v.* Mayor of New York, 8 Wend. 85; Matter of Lewis St., 2 Wend. 472; Matter of Seventeenth St., 1 Wend. 262; Department of Public Parks, 13 N. Y. Sup. Ct. 486 (overruling Matter of Brooklyn Heights, 48 Barb. 288); *In re* Story St., (Phila. C. P.) Leg. Int. 1876.

[4] The State *v.* Carragan, 36 N. J. L. 52; The State *v.* Seymour, 35 N. J. L. 47; Matter of Wall St., 17 Barb. 617; Moale *v.* Baltimore, 5 Md. 314.

[5] Moale *v.* Baltimore, 5 Md. 314.

CHAPTER XXI.

OF THE ASSESSMENT OF DAMAGES BY COMMISSIONERS.

§ 226. Appointment of commissioners.
227. Disinterested persons — Freeholders.
228. Oath of commissioners.
229. Place and time of meeting — Adjournments.
230. Power of majority of commissioners to act.
231. Vacancy in board.
232. Supervision of court over proceedings of commissioners.
233. Control of the commissioners over proceedings — Application to commissioners.
234. Prejudice of commissioners.
235. Conversing or discussing with commissioners.
236. Treating and entertaining commissioners.
237. Evidence before commissioners — Admissibility.
238. Record of commissioners.
239. Preserving rulings and evidence.
240. When report should be made.
241. Review of report — Recommitting report.
242. How to obtain a review.
243. Presumption in favor of the regularity of action of commissioners.
244. Irregularity in arriving at the amount of damages.
245. Wrong principle in estimating.
246. Error in amount of damages — Itemized findings.

§ 226. **Appointment of commissioners.** — The appointment of commissioners to assess damages is generally delegated to a court of record, which generally retains supervision of their proceedings. If the court refuses to appoint commissioners, it may be compelled to, by *mandamus*.[1] When commissioners are to be appointed by a court, there must be an exercise of judgment in the selection, and such commissioners cannot properly be selected by lot; nor can

[1] Western R. R. v. Dickson, 30 Wis. 389.

the selection be confined to a number of individuals previously selected by a city council.[1]

§ 227. **Disinterested persons — Freeholders.** — In order to obtain a fair assessment of damages, the statutes frequently require that the commissioners shall be disinterested, and in some cases disinterested freeholders. The qualification would exclude an uncle of one of the petitioners,[2] or an owner of land affected.[3] A stockholder in a railroad over which the proposed highway is to be laid is not disinterested.[4] A stockholder in a railroad is not a disinterested commissioner in condemning land for the use of the railroad.[5] The company cannot object, after an appraisement, that commissioners were stockholders in it; because the bias, if any, would be in favor of the company.[6] The interest intended is a pecuniary interest, and does not refer to a disqualification from being within the fourth degree of consanguinity to one of the petitioners.[7] In Indiana, the relationship of sister-in-law, niece, and nephew, owning land along the proposed improvement, would disqualify the brother-in-law or uncle from acting as appraiser, and the disqualification is held to extend to the sixth degree of consanguinity, or within the degree of second cousins.[8] Where one of the commissioners was brother-in-law of the land-owner entitled to damages, the proceedings were *coram non judice*, and utterly void.[9] The pecuniary interest should be more than that of a simple tax-payer, whose taxes

[1] Menges *v.* Albany, 56 N. Y. 374.
[2] Clifford *v.* Commissioners, 59 Me. 262.
[3] The State *v.* Delesdernier, 11 Me. 473; The State *v.* Crane, 36 N. J. L. 394. *Contra*, Matter of Southern Boulevard, 8 Abb. Pr. (N. S.) 447.
[4] Friend, appellant, 58 Me. 387.
[5] Rock Island R. R. *v.* Lynch, 28 Ill. 645.
[6] Strang *v.* Beloit R. R., 16 Wis. 635.
[7] Chase *v.* Rutland, 47 Vt. 398.
[8] High *v.* Ditching Assn., 44 Ind. 356.
[9] Taylor *v.* Commissioners of Worcester, 105 Mass. 225.

might be affected. There must be a more direct and peculiar benefit or advantage to be obtained.[1] An omission to make the objection that the commissioner was interested, if the fact was known, would operate as a waiver.[2] The report of persons disqualified by statute as interested parties is a nullity.[3] The fact that the commissioners were disinterested freeholders should appear in the record of appointment.[4] The fact is jurisdictional.[5] In the absence of evidence on the subject, it is presumed that the commissioners were duly qualified.[6] It is no answer, to an exception that one commissioner was disqualified, that the commissioners need not be unanimous. They should all be competent and disinterested, even though they do not all concur.[7] One who has a bond for a deed, not having paid all the purchase-money, may properly be considered a freeholder.[8]

§ 228. **Oath of commissioners.** — Commissioners should be sworn before entering upon their duties.[9] The public have an interest in the regularity of proceedings of matters such as the laying-out of roads, and the commissioners of view must be sworn, or the proceedings will be quashed.[10] The action of commissioners is not defeated from the fact of their being sworn by an officer not authorized to administer oaths.

[1] Chase *v.* Rutland, 47 Vt. 393; The State *v.* Crane, 36 N. J. L. 394. The rule in New Jersey was formerly different.

[2] Towns *v.* Stoddard, 30 N. H. 23; Ipswich *v.* Essex, 10 Pick. 519; Groton *v.* Hulburt, 22 Conn. 178; Baldwin *v.* Calkins, 10 Wend. 167; Matter of Southern Boulevard, 3 Abb. Pr. (N. S.) 447; Matter of Wells County Road, 7 Ohio St. 16; Baddeley, *ex parte*, 5 Dow. & L. 575; Trustees of Emanuel Hospital *v.* Metropolitan Rail. Co., 19 L. T. (N. S.) 692.

[3] Daggy *v.* Green, 12 Ind. 303.

[4] Judson *v.* Bridgeport, 25 Conn. 426; The State *v.* Jersey City, 25 N. J. L. 309. *Contra*, Kellogg *v.* Price, 42 Ind. 360, where it is considered to be a matter to be raised by answer.

[5] The State *v.* Jersey City, 25 N. J. L. 309.

[6] App's Road, 17 Serg. & R. 388.

[7] Rock Island R. R. *v.* Lynch, 28 Ill. 645.

[8] New Orleans R. R. *v.* Hemphill, 35 Miss. 17.

[9] Frith *v.* Justices, 30 Ga. 723.

[10] Fisher *v.* Smith, 5 Leigh, 611.

This defect does not defeat the action of judicial or executive officers.[1] The certificate of the oath returned by the clerk is constructive notice to all parties of all the facts contained in the certificate, and parties desiring to object to their qualification as commissioners should do so before the hearing on the report, or the objection will be considered as waived,[2] especially if the party appears in the proceedings.[3] If the justice fails to certify when the oath was taken, the return would be defective, and could not be supplied by supplemental certificate.[4] The record should show the fact of swearing the commissioners,[5] and, in New Jersey, should return the oath taken;[6] and the report will be set aside for verbal inaccuracies in the oath.[7] It would be irregular to swear only ten out of the twelve viewers, or less than all.[8] The commissioners need not be sworn when the report is recommitted to them.[9]

§ 229. **Place and time of meeting — Adjournments.** — Commissioners must meet at the time and place designated in the order, or the proceedings will be set aside.[10] The parties interested have a right to be heard, to except, and appeal; and in order to do this, the appointment must be kept.[11]

Failure of the commissioners to adjourn from day to day is not a defect jurisdictional in its character, and is waived

[1] Woolsey *v.* Hamilton County, 32 Iowa, 130.

[2] Wentworth *v.* Farmington, 51 N. H. 128; Goodwin *v.* Milton, 25 N. H. 458.

[3] Towns *v.* Stoddard, 30 N. H. 28.

[4] The State *v.* Northrop, 18 N. J. L. 271; The State *v.* Burnet, 14 N. J. L. 385; Bennett *v.* Camden R. R., 14 N. J. L. 145.

[5] Pollard *v.* Ferguson, 1 Litt. 196; Virginia R. R. *v.* Lovejoy, 8 Nev. 100.

[6] The State *v.* Barnes, 18 N. J. L. 268; The State *v.* Davis, 18 N. J. L. 10; Hoagland *v.* Culvert, 20 N. J. L. 387; The State *v.* Allen, 8 N. J. L. 301; The State *v.* Hutchinson, 10 N. J. L. 242. *Contra*, New Orleans R. R. *v.* Hemphill, 35 Miss. 17.

[7] The State *v.* Ayres, 15 N. J. L. 479; The State *v.* Green, 15 N. J. L. 88; The State *v.* Shreve, 4 N. J. L. 297; Cambria St., 75 Pa. 357.

[8] Broad Street Road, 7 Serg. & R. 444; Wells County Road, 7 Ohio St. 16.

[9] Low *v.* Galena R. R., 18 Ill. 324.

[10] The State *v.* Scott, 9 N. J. L. 17.

[11] Roberts *v.* Williams, 13 Ark. 355.

by appeal.[1] Committees may adjourn their hearings from time to time, any unreasonable, unfair, or partial conduct on their part, in this respect, being reason for setting aside any report which they may make. An adjournment publicly announced is the easiest and most common mode of securing the attendance of parties; a written notice, signed by the committee, and duly served upon every person interested, involves much more labor, but is equally effective. The committee, having opened the trial at the place specified in the commission from the court, have power to continue it at another place, giving due notice of the change, and being responsible to the court for their action in this respect.[2]

§ 230. **Power of majority of commissioners to act.** — A majority of commissioners may make a good award, if all have heard the evidence.[3] All must be present at the examination and determination of the questions referred to them.[4] It must appear that all were notified to attend the meeting.[5] If all are not notified, or present, they must adjourn.[6] One commissioner cannot authorize another to sign his name to the order of laying out.[7] The common-law rule is that all should act, but, for convenience, this rule is altered by statute, so as to allow the majority to act; but all the facts must appear on the record.[8] The failure of one commissioner to act is an irregularity which cannot be

[1] Allison *v.* Commissioners, 54 Ill. 170.

[2] Goodwin *v.* Wethersfield, 43 Conn. 437.

[3] Plymouth County Commissioners, 16 Gray, 341; Van Steenbergh *v.* Bigelow, 8 Wend. 42; Rogers, *ex parte*, 7 Cow. 526; Baltimore Turnpike, 5 Binn. 481; Hall *v.* The People, 57 Ill. 307; Young *v.* Buckingham, 5 Ohio, 485.

[4] Board of Commissioners *v.* Lansing, 45 N. Y. 19; Woolsey *v.* Tompkins, 23 Wend. 324; Fourth Avenue, 11 Abb. Pr. 189.

[5] Chapman *v.* Swan, 65 Barb. 210; Christy *v.* Newton, 60 Barb. 332; Stewart *v.* Wallis, 30 Barb. 344; Shough, *ex parte*, 16 N. J. L. 264; Griscom *v.* Gilmore, 16 N. J. L. 105; The State *v.* Shreve, 4 N. J. L. 297.

[6] The State *v.* Van Geison, 15 N. J. L. 339.

[7] Todd *v.* Todd, 10 N. Y. Sup. Ct. 298.

[8] The People *v.* Williams, 36 N. Y. 441; The People *v.* Hynds, 30 N. Y. 470; Broadway Widening, 68 Barb. 572; The State *v.* Van Geison, 15 N. J. L. 339; Virginia R. R. *v.* Lovejoy, 8 Nev. 100.

questioned in a collateral proceeding, after the report has been confirmed.[1] In Maine, where a committee is agreed upon instead of a jury, they must all concur, or the proceedings will be void.[2]

§ 231. **Vacancy in board.** — In case of a vacancy in the board of commissioners, the remaining members have no power to act in laying out a highway, — not even to make their report, although all had agreed before the vacancy occurred.[3]

§ 232. **Supervision of court over proceedings of commissioners.** — The supervision of the court is not confined to technical errors, but its supervision is like its supervision over the verdict of a jury. The report of commissioners may be set aside for reasons that would justify the setting aside of the verdict of a jury, and evidence is admissible to the same extent in one case as the other.[4] The court cannot make an alteration in the report, by adding to or deducting from it. But, for minor errors, the court will not refuse to confirm the report.[5] The court may set aside proceedings if there has been such carelessness or irregularity on the part of the commissioners as amounts to misconduct, by which a party has been harmed. The same reason which would lead to the setting aside of a verdict of a jury or a report of a referee, for the misconduct, palpable mistake, or accident of either, will suffice for the like interference with the report of commissioners.[6]

§ 233. **Control of the commissioners over proceedings.** — Commissioners assessing damages may allow an

[1] Quayles v. Missouri R. R., 63 Mo. 465; Austin v. Helms, 65 N. C. 560; Hays v. Parrish, 52 Ind. 182.

[2] McLellan v. Commissioners, 21 Me. 390.

[3] Wentworth v. Farmington, 49 N. H. 128.

[4] Hannibal Bridge v. Schaubacher, 49 Mo. 555.

[5] St. Louis R. R. v. Almeroth, 62 Mo. 343; Mississippi River Bridge v. Ring, 58 Mo. 491.

[6] Matter of New York Central R. R., 64 N. Y. 60.

amendment of petition before the warrant is issued to the jury. The commissioners act judicially, and the action is a civil action.[1] Commissioners may decide which party shall have the open and close.[2] In a hearing on the merits, they will not be justified in restricting the owners to the presentation of objections in writing.[3] Objections should be taken before the commissioners, in order to give them an opportunity to obviate their mistakes; and hence objections would not be entertained in the appellate court, unless also made before the commissioners.[4] Application must be made to commissioners at a regular term, or session;[5] and the application should not be filed with the clerk of the commissioners, but be made to the commissioners themselves.[6]

§ 234. **Prejudice of commissioners.** — Reports of commissioners may be impeached for partiality, bias, prejudice, or inattention, or unfaithfulness in discharge of their trust, or for error of such extraordinary character or grossness as should furnish a just inference of the existence of such influences.[7] In case of such prejudice being shown, the report would be set aside, and the owner would be excused from failing to offer evidence to a tribunal which he knew would be prejudiced.[8] The allegations of such prejudice should be certain and particular. A general allegation that the commissioners were actuated by motives of gross partiality is too indefinite and uncertain to require the consideration of the court.[9] The fact that commissioners received

[1] Grand Junction R. R. *v.* Middlesex, 14 Gray, 558.

[2] Albany R. R. *v.* Lansing, 16 Barb. 68.

[3] The State *v.* Jersey City, 25 N. J. L. 309.

[4] Matter of Clear Lake Water Co., 48 Cal. 586.

[5] Eaton *v.* Framingham, 6 Cush. 245.

[6] Charles River R. R. *v.* County Commissioners, 7 Gray, 389.

[7] Bryant *v.* Glidden, 86 Me. 36; Thompson *v.* Conway, 58 N. H. 622; The State *v.* Justice, 24 N. J. L. 418; Bennett *v.* Camden R. R., 14 N. J. L. 145; Pennsylvania R. R. *v.* Lutheran Congregation, 58 Pa. 445; Inge *v.* Police Jury, 14 La. An. 117.

[8] Cole *v.* Peoria, 18 Ill. 301.

[9] Minot *v.* Cumberland Commissioners, 28 Me. 121.

larger than statutory fees will not avoid the report, unless corruption is charged.[1] No action will lie against the commissioners for malice, but errors committed may be remedied by appeal.[2] If either party has been excluded from a hearing, the appraisement will be void.[3]

§ 235. **Conversing or discussing with commissioners.** — The commissioners should be free from prejudice or undue influence. They should not converse or discuss with one party in the absence of the opposing party. If a report is made in favor of one party, after such a discussion has been had by him, the report will be set aside.[4] Especially is it exceptionable to leave viewers to the direction of the applicant for a road.[5] The commissioners may converse with adjoining owners, that being proper evidence on which to base conclusions.[6] Influence used, to change the opinion of a committee appointed to report on the necessity of a road, will not cause the report to be set aside, if the influence was not used by the prevailing party, and was not exerted in his interest. The action, although irregular, should not prejudice the rights of the innocent party.[7]

§ 236. **Treating and entertaining commissioners.** — The furnishing of liquor, by petitioner for a highway, to commissioners, while engaged in their labors, is an abuse for which the court will ordinarily set aside a report in favor of the petitioner, without inquiry as to how far the commissioners were affected by it.[8] *Primâ facie*, it is improper that commissioners should be entertained at the house of one of the petitioners; but where there was no public-house, and it was necessary for commissioners to stay all night,

[1] The State v. Miller, 23 N. J. L. 383; The State v. Bergen, 21 N. J. L. 342.
[2] Sage v. Laurain, 19 Mich. 137.
[3] Peckham v. School District, 7 R. I. 545.
[4] Peavey v. Wolfborough, 37 N. H. 286.
[5] Hubbard v. Wickliffe, 2 A. K. Marsh. 503.
[6] Spring Garden St., 4 Rawle, 192.
[7] Goodwin v. Wethersfield, 43 Conn. 437.
[8] Newport Highway, 48 N. H. 433.

and there was no improper influence shown, and where counsel for both sides stayed at the same house and acquiesced, the report would not be set aside, although the entertainment was handsome and liberal, and without charge.[1] It is not sufficient, to set aside the report, that dinners were furnished to commissioners,[2] when the place appointed for meeting was at the house of the applicant who furnished the entertainment,[3] or if no abuse is shown.[4]

§ 237. **Evidence before commissioners — Admissibility.** — The commissioners must pass on the competency of evidence. They must regulate the order and course of business before them, and having heard all the evidence on a point that they may deem necessary, may refuse to hear other evidence on the same point. A refusal to give a fair hearing would cause a reconsideration of the report,[5] but they may refuse to hear further cumulative evidence.[6] If incompetent evidence has been received, the Supreme Court will not receive evidence to prove that the commissioners did not deem the evidence material, and disregarded the same, but may, on *certiorari*, quash the proceedings ;[7] but the award will not be set aside for technical error. The error should be of such a character as to show that the commissioners have misapplied the principles upon which they were to make their appraisement.[8] Commissioners appointed to

[1] Beardsley *v.* Washington, 39 Conn. 265.

[2] The State *v.* Justice, 24 N. J. L. 418.

[3] The State *v.* Bergen, 21 N. J. L. 342.

[4] Coleman *v.* Moody, 4 Hen. & M. 1; Plymouth Road, 5 Rawle, 150. In a later case, in Pennsylvania, not in the Supreme Court (Matter of Magnolia St., 8 Phila. 468), the practice is condemned, as giving the rich and unscrupulous too much advantage.

[5] Washington R. R. *v.* Switzer, 26 Gratt. 661; Central Pacific R. R. *v.* Pearson, 35 Cal. 247; Jones *v.* Goffstown, 39 N. H. 254; Hawley *v.* North Staffordshire Rail. Co., 2 De G. & Sm. 33.

[6] Jones *v.* Goffstown, 39 N. H. 254.

[7] Petition of Landaff, 34 N. H. 163 (overruling Goodwin *v.* Milton, 25 N. H. 458); Smith *v.* Conway, 17 N. H. 586.

[8] Troy R. R. *v.* Northern Turnpike Co., 16 Barb. 100; Virginia R. R. *v.* Henry, 8 Nev. 165.

view and appraise are not compelled to examine witnesses, although they may;[1] and their refusal to do so is not sufficient ground for reversal.[2] Commissioners are not governed exclusively by the evidence before them, but may be guided by a view made by them;[3] and may be guided by their knowledge of the country, and the wants and wishes of the people, and the ability of the neighborhood to keep the road in repair.[4] The commissioners are not compelled to hear arguments.[5] Arbitrators, under the English Lands Clauses Consolidation Act, may consult other persons, provided they act on their own judgment, but they must not bind themselves to abide by the opinions of such persons.[6]

§ 238. **Record of commissioners.** — The proceedings must show that the commissioners acquired jurisdiction. A record which fails to show that jurisdiction attached, cannot be helped out by intendment or presumption.[7] Such record need not set forth in full all the proceedings had. For instance, the oath of viewers need not be set forth in the report, if the report showed that they took the oath prescribed by law.[8] The proceedings should be reduced to writing, and show the extent of land taken.[9] Commissioners cannot correct errors after assessment filed.[10] If the record does not show the irregularities which have been committed in their proceedings, the report may be set aside for that reason.[11] Proceedings *in pais* by commissioners may be

[1] Pennsylvania R. R. *v.* Keiffer, 22 Pa. 356.

[2] Lyman *v.* Burlington, 22 Vt. 131; Van Wickle *v.* Camden R. R., 14 N. J. L. 162.

[3] Virginia R. R. *v.* Henry, 8 Nev. 165; Kramer *v.* Cleveland R. R., 5 Ohio St. 140.

[4] Commissioners' Court *v.* Bowie, 84 Ala. 461.

[5] Kramer *v.* Cleveland R. R., 5 Ohio St. 140.

[6] Whitmore *v.* Smith, 29 L. J. (Exch.) 402; Caledonia Rail. Co. *v.* Lockhart, 3 Macq. H. L. Cas. 808.

[7] Miller *v.* Brown, 56 N. Y. 383.

[8] Hannibal R. R. *v.* Morton, 27 Mo. 317.

[9] Hayes *v.* Shackford, 3 N. H. 10.

[10] The People *v.* Mott, 19 N. Y. Sup. Ct. 672.

[11] Rochester R. R. *v.* Beckwith, 10 How. Pr. 168.

proved by parol, when no complete record is made and the original papers are lost.[1]

§ 239. **Preserving rulings and evidence.** — Bills of exceptions to action of commissioners cannot be taken to their proceedings, unless provided by charter or statute.[2] The irregularities in proceedings can only be proved by parol in case of absence of statute providing for the preservation of the rulings and instructions of the commissioners, or the party presiding over the jury. When such certificates of exceptions can be made, that is the proper and only way of preserving them.[3] It is good practice for commissioners to return the evidence produced before them,[4] but a failure to do so does not invalidate the report.[5] In order to comply with a statute requiring report of "proceedings in the premises," there should be, in the report, minutes of testimony, and rulings on all points as to admissibility and rejection of testimony, and also the rules or principles of the decision of commissioners.[6] Commissioners may properly itemize damages, so that the court may understand the finding. They need not itemize the benefits and damages, but may give the excess of damages over benefits.[7] Where bills of exceptions are not allowed to such proceedings, they may be corrected by *certiorari*.[8]

§ 240. **When report should be made.** — Report need not be made to a regular term of court. An appeal from such a report does not require any judicial action, and may be made out of regular term-time.[9] When the appeal is to

[1] Young *v.* Buckingham, 5 Ohio, 485.
[2] Hannibal R. R. *v.* Morton, 27 Mo. 317.
[3] Allen *v.* Androscoggin R. R., 60 Me. 494.
[4] Virginia R. R. *v.* Lovejoy, 8 Nev. 100.
[5] Virginia R. R. *v.* Henry, 8 Nev. 165.
[6] Central Pacific R. R. *v.* Pearson, 35 Cal. 247.
[7] California Pacific R. R. *v.* Frisbie, 41 Cal. 356.
[8] Lyman *v.* Burlington, 22 Vt. 131.
[9] Northampton Bridge, 116 Mass. 442.

be taken at a certain time, the report must be filed so that the appeal may be perfected in time, and the commissioners have no right to postpone their action;[1] and if the opportunity of appealing is lost, the report will, on motion, be quashed.[2]

§ 241. **Review of report — Recommitting report.** — When commissioners are sent back to make their report according to law, the proceedings cannot be called a review of the report, but merely seeing that the report of commissioners was in conformity to law. One review is generally granted to one party, and the operation of sending back the report would not be such a review as the statute contemplates.[3] The court cannot amend the assessment of commissioners, but, on consideration, must approve, reject, or recommit the report.[4] A recommitment is not a failure of the proceedings, within a statute providing that when proceedings have failed a new application could not be made within a limited time.[5] If the report is various and conflicting, the court may in its discretion recommit.[6] The failure of commissioners to find damages for an owner,[7] or to give a fair hearing,[8] are causes for setting aside a report. The same commissioners may make a new report, and, if satisfactory to the court, the same may be approved;[9] and the report may be recommitted even after it has been confirmed, when it is in fact illegal and unjust.[10] An application for a reassessment is not in the nature of an appeal, but of a motion for a rehearing, and several owners may

[1] Wood *v.* Commissioners, 62 Ill. 391.
[2] Roberts *v.* Williams, 13 Ark. 355.
[3] Hannibal R. R. *v.* Rowland, 29 Mo. 387.
[4] Matter of Claiborne St., 4 La. An. 7; Rossignac St., 4 Rob. (La.) 357.
[5] Towamencin Road, 10 Pa. 195.
[6] New Orleans R. R. *v.* Zeringue, 23 La. An. 521.
[7] Patten's Petition, 16 N. H. 277.
[8] Central Pacific R. R. *v.* Pearson, 35 Cal. 247.
[9] Lyman *v.* Burlington, 22 Vt. 131; Potts's Appeal, 15 Pa. 414.
[10] Broadway Widening, 61 Barb. 483.

join in such application.[1] In Virginia, it is considered that, on the setting aside of a report, the commissioners must be newly appointed and re-sworn.[2]

§ 242. **How to obtain a review.** — The proper process of bringing the proceedings of selectmen, city councils, commissioners, and other inferior tribunals, in laying out roads and streets, before a superior court, is by writ of error, *certiorari*, or *mandamus*. The proceedings cannot be reviewed on a bill in equity.[3] Either party may show cause against the report, and are not confined to specific objections,[4] and may move to quash the report.[5] The land-owner has a right to object to the report, and obtain a reconsideration, independent of statute. He should be permitted to show that the property was not taken for public uses, or that the compensation was wholly inadequate.[6] Affidavits will not be received tending to contradict the report on matters of fact, nor will the commissioners be permitted to stultify themselves by alleging that they signed the report without reading it.[7] The case cannot be reopened before the commissioners after the parties have submitted the matter.[8]

§ 243. **Presumptions in favor of the regularity of action of commissioners.** — In order to set aside a report of commissioners, something must be shown tending to prove that the principles on which they proceeded were incorrect; but, until that is shown, the presumption is in favor of their adjudication,[9] and their proceedings will be upheld until

[1] The People *v.* White, 59 Barb. 666.
[2] Pollard *v.* Ferguson, 1 Litt. 196.
[3] Baldwin *v.* Bangor, 36 Me. 518.
[4] Washington R. R. *v.* Switzer, 26 Gratt. 661.
[5] Mitchell *v.* Thornton, 21 Gratt. 164.
[6] Farmer *v.* Stewart, 2 N. H. 97.
[7] Rochester R. R. *v.* Beckwith, 10 How. Pr. 168.
[8] The People *v.* Ferris, 41 Barb. 121.
[9] Quincy R. R. *v.* Ridge, 57 Mo. 599; Matter of Pearl St., 19 Wend. 651;

quashed or reversed.[1] In collateral proceedings, the action of commissioners is presumed to have been correct if jurisdiction attached. Instead of bringing trespass because the proceedings are irregular, a *certiorari* should be sought.[2] Reports are only to be set aside on good cause shown; not because the parties are dissatisfied with the amount of the award.[3] It is a good cause, that the amount awarded was unreasonable.[4] While evidence as to the amount of the award, and its justness, is admissible, it is not controlling. It is simply the opinion of witnesses, and should not have greater weight than the official acts of the commissioners, who have considered all the evidence.[5] Reports or awards which are ambiguous will, if possible, be construed by the courts as within the legal exercise of the powers of the commissioners.[6] Equity does not interfere with awards, except upon extrinsic evidence not before the commissioners, and then only in a very clear case.[7]

§ 244. **Irregularity in arriving at the amount of damages.** — The manner of arriving at the result of an assessment is subject to examination, but not the conclusion of the commissioners on the facts.[8] The three commissioners cannot put down the amount respectively determined on by them, and divide the sum by three, and return the quotient as the result. Such a finding would be set aside.[9] If the

Commissioners of Central Park, 4 Lans. 467; Troy R. R. v. Lee, 18 Barb. 169; The State v. Justice, 24 N. J. L. 418; Pennsylvania R. R. v. Porter, 29 Pa. 165; Crawford v. Valley R. R., 25 Gratt. 467; Virginia R. R. v. Henry, 8 Nev. 165.

[1] Cyr v. Dufour, 62 Me. 20; Matter of South Seventh St., 48 Barb. 12.

[2] Van Steenbergh v. Bigelow, 8 Wend. 42.

[3] Virginia R. R. v. Elliott, 5 Nev. 358.

[4] Chapman v. Groves, 8 Blackf. 308.

[5] St. Louis R. R. v. Richardson, 45 Mo. 466; William and Anthony Sts., 19 Wend. 678; Matter of Pearl St., 19 Wend. 651; Commissioners of Central Park, 51 Barb. 277; Virginia R. R. v. Elliott, 5 Nev. 358.

[6] Eastern R. R. v. Concord R. R., 47 N. H. 108.

[7] Baldwin v. Buffalo, 35 N. Y. 375.

[8] Lee v. Tebo R. R., 53 Mo. 178; Rochester R. R. v. Beckwith, 10 How. Pr. 168.

[9] Kansas City R. R. v. Campbell, 62 Mo. 585.

damages are flagrantly excessive, or if there are manifest indications, on the part of the commissioners, of an entire lack of appreciation of their duties, the court will interfere.[1] A jury cannot add up the amounts sworn to by witnesses, and divide by the number of witnesses, to find the amount of damages.[2]

§ 245. **Wrong principle in estimating.** — When it is certain that an award of damages is arrived at on a wrong principle, the presumption is that the jury or commissioners have been influenced by an improper motive, and the court will not attempt to correct the estimate, however small, but will, in its discretion, grant a new assessment.[3] The errors to be corrected must be in the principle of assessing values, or some obvious error in calculation.[4] The grounds may be shown by the affidavits of the commissioners. The commissioners are not like a common-law jury, and their finding may be impeached by their own affidavits showing that they proceeded on wrong principles.[5] The rule on which commissioners acted is a fact, and may be shown as any other fact; and if they awarded for a fraction of a tract a larger sum than the value of the whole tract, the principle on which they acted must be erroneous.[6]

§ 246. **Error in amount of damages — Itemized findings.** — An appellate court will not interfere with the report of commissioners, to correct the amount of damages, except in cases of gross error, showing prejudice or corruption.[7]

[1] Kansas City R. R. *v.* Campbell, 62 Mo. 585.

[2] Peoria R. R. *v.* Birkett, 62 Ill. 332.

[3] Cyr *v.* Dufour, 62 Me. 20.

[4] Matter of Beale St., 39 Cal. 495; William and Anthony Sts., 19 Wend. 678; Coster *v.* New Jersey R. R., 24 N. J. L. 780; New Jersey R. R. *v.* Suydam, 17 N. J. L. 25.

[5] Canal Bank *v.* Albany, 9 Wend. 244. See § 242, note 5, as to errors of fact.

[6] New Jersey R. R. *v.* Suydam, 17 N. J. L. 25.

[7] The Commonwealth *v.* McAllister, 2 Watts, 190; Chesapeake R. R. *v.* Pack, 6 W. Va. 397; Reitenbaugh *v.* Chester R. R., 21 Pa. 100.

The commissioners cannot find a greater amount of damages than is claimed by the owner.[1] The commissioners hear the evidence, and frequently make their principal evidence out of a view of the premises; and this evidence cannot be carried up so as to correct the report as being against the weight of evidence.[2] Hence, for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting.[3] Commissioners are not bound by the opinions of experts, or by the apparent weight of evidence, but may give their own conclusions.[4] Where items are distinctly stated, and improper items are included, the court may disregard the improper items and give judgment for the proper items.[5] It is proper for the court to direct a finding by items.[6] When the statute requires various items to be set out, a lumping verdict will be set aside,[7] and the matter recommitted.[8]

[1] Houston R. R. *v.* Milburn, 34 Texas, 224.

[2] Winebiddle *v.* Pennsylvania R. R., 2 Grant, 82.

[3] Thompson *v.* Conway, 53 N. H. 622; Matter of Pearl St., 19 Wend. 651; Matter of Bushwick Avenue, 48 Barb. 9; Rondout R. R. *v.* Field, 38 How. Pr. 187; Pennsylvania R. R. *v.* Lutheran Congregation, 53 Pa. 445; Pennsylvania R. R. *v.* Heister, 8 Pa. 445; Willing *v.* Baltimore R. R., 5 Whart. 460; Western Pacific R. R. *v.* Reed, 35 Cal. 621.

[4] Antoinette St., 8 Phila. 461; Albany R. R. *v.* Dayton, 10 Abb. Pr. (N. S.) 182.

[5] Dalrymple *v.* Whitinghaus, 26 Vt. 345.

[6] Harvey *v.* Lackawanna R. R., 47 Pa. 428.

[7] Ohio R. R. *v.* Wallace, 14 Pa. 245.

[8] Greenville R. R. *v.* Nunnamaker, 4 Rich. L. 107.

CHAPTER XXII.

OF THE ASSESSMENT OF DAMAGES BY A JURY.

§ 247. How the jury should be summoned.
248. Qualifications of jurors — Freeholders.
249. Disqualification from interest.
250. Swearing jury.
251. Objections to jurors.
252. Submission of similar issues to same jury.
253. Sources of information.
254. Jury of viewers.
255. Proceedings before jury — Practice — Evidence.
256. Decision of majority.
257. Itemizing verdict — Averaging.
258. Conditions in verdicts.
259. Setting aside verdict of jury.
260. Reassessment by jury.

§ 247. **How the jury should be summoned.** — When the statute provides that the jury shall be drawn, summoned, and notified as in ordinary cases, they may be summoned by constables, or sheriffs, or partly by either.[1] Fourteen men may be summoned, from whom a jury of twelve may be selected.[2] The drawing should be in presence of the court, and under judicial supervision.[3] The warrant for the jury should show the land over which the railroad passes, the title, and location.[4]

§ 248. **Qualifications of jurors — Freeholders.** — The legislature may prescribe that the jurors assembled to assess

[1] Meacham *v.* Fitchburg R. R., 4 Cush. 291.
[2] Fitchburg R. R. *v.* Boston R. R., 3 Cush. 58.
[3] Convers *v.* Grand Rapids R. R., 18 Mich. 459.
[4] Walker *v.* Boston R. R., 3 Cush. 1.

damages shall be freeholders; and this is done because they are supposed to have personal knowledge of the value of real estate in the vicinity, which entitles them to rely somewhat on their own opinions.[1] Freeholders need not be freeholders of the county in which they are summoned, if freeholders within the state.[2] A man who has a bond for a deed, not having paid for the land, is still a freeholder.[3] A juror from the "vicinage" means, from the county where the land is situated, — not from the town or neighborhood.[4] A jury from the three nearest towns means, from the three towns nearest to the town in which the land lies, — not nearest to the land taken.[5] The town in which the land lies is not included. When there are applications from owners in different adjoining towns, the only practicable way is to take a jury from three of the towns nearest to the town in which the piece of land taken is situated.[6]

§ 249. **Disqualification from interest.** — A juror who has a similar claim for damages to the one on trial is not a competent juror.[7] Stockholders in a railroad are incompetent on the trial of the case against the railroad, and parties may object as soon as they learn the fact.[8] The fact that a juror was a stockholder in another railroad against which a similar case was pending, which was to be tried immediately afterward, is no objection.[9] A juror is not incompetent because he is a citizen of the town in which the road is to be built, and hence liable to pay taxes.[10] A free-

[1] Remy *v.* Municipality, 12 La. An. 657; Tipton *v.* Miller, 3 Yerg. 423.
[2] New Orleans R. R. *v.* Hemphill, 35 Miss. 17.
[3] *Ibid.*
[4] Convers *v.* Grand Rapids R. R., 18 Mich. 459.
[5] Reed *v.* Hanover Branch R. R., 105 Mass. 303.
[6] Wyman *v.* Lexington R. R., 13 Metc. 316.
[7] Flagg *v.* Worcester, 8 Cush. 69.
[8] Peninsular R. W. *v.* Howard, 20 Mich. 18.
[9] The Commonwealth *v.* Boston R. R., 3 Cush. 25.
[10] Johnston *v.* Rankin, 70 N. C. 550.

holder is not incompetent because he had signed a remonstrance against the road, but is incompetent if he had expressed an opinion as to the amount of damages.[1]

§ 250. **Swearing jury.** — It is presumed that the jury should be sworn, although there be no particular provision requiring it.[2] The return of the jury must show that they were sworn.[3] The oath must conform to the statutes, and should show the subjects the jury are to consider.[4] Objections as to the manner of swearing the jury should be made before verdict.[5]

§ 251. **Objections to jurors.** — Challenges must be made before the jury are sworn, and before they enter on their duties.[6] Peremptory challenges are not allowed in Michigan, except in criminal cases, and would certainly not be allowed in case of a jury assessing damages.[7] Objections to the competency of jurors should be taken at the trial, or the objection will be presumed to be waived.[8] Parties should not take the chances of a favorable verdict, and, when the same is unfavorable, except.[9] The objection cannot be raised for the first time in the appellate court.[10] An objection that the jurors were not freeholders may be waived, especially where there is an absence of proof that the jurors were not freeholders, and no objection was made at the time.[11] If the statute provides for a jury of six, and the

[1] Readington *v.* Dilley, 24 N. J. L. 209.
[2] Lumsden *v.* Milwaukee, 8 Wis. 485.
[3] Owen *v.* Jordan, 27 Ala. 608.
[4] Molett *v.* Keenan, 22 Ala. 484.
[5] Rockford R. R. *v.* McKinley, 64 Ill. 338.
[6] Molett *v.* Keenan, 22 Ala. 484.
[7] Convers *v.* Grand Rapids R. R., 18 Mich. 459
[8] Fowler *v.* Middlesex, 6 Allen, 92; Tripp *v.* Commissioners, 2 Allen, 556; Readington *v.* Dilley, 24 N. J. L. 209; Mansfield R. R. *v.* Clark, 23 Mich. 519.
[9] Walker *v.* Boston R. R., 3 Cush. 1.
[10] Commissioners' Court *v.* Bowie, 34 Ala. 461.
[11] The People *v.* Taylor, 34 Barb. 481.

parties go to trial with five, the defect, being one not of jurisdiction, is waived.[1] The error of the disqualification of a juror is not an error of jurisdiction.[2] It is not a valid objection to a juror that he had been an appraiser of damages on another railroad in the same county, or that he was a stockholder in a railroad that had long before that time acquired the lands necessary for its use.[3]

§ 252. **Submission of similar issues to same jury.** — It is proper to submit the assessment of damages for taking land to widen a highway, and a petition to revise damages to the same land by altering a grade, to the same jury.[4] There is no objection to the appointment of the same freeholders to three different cases of reassessment;[5] and the same viewers may reassess damages where the recommitment is on account of a formal error.[6] In Virginia, it is considered a fatal error that two jurors had been on a former inquisition in the same case.[7] If viewers do not act, others may be appointed to fill their places, from term to term, until the road is either located or the petition rejected.[8]

§ 253. **Sources of information.** — In assessing damages, the jury are left free to determine not only what information they need, but to obtain it from any source and in any way which would be open to a private citizen seeking similar information in his own business. The jury may hear oral statements and arguments, and examine leases and

[1] Avery *v.* Groton, 36 Conn. 304.
[2] The State *v.* Wilson, 17 Wis. 687.
[3] The People *v.* First Judge, 2 Hill, 398.
[4] Dickenson *v.* Fitchburg, 13 Gray, 546.
[5] Readington *v.* Dilley, 24 N. J. L. 209.
[6] Road in Chartiers, 34 Pa. 418.
[7] Hunter *v.* Matthews, 12 Leigh, 228.
[8] Henline *v.* The People, 81 Ill. 269.

books, and may even receive affidavits.[1] If they are misled, their report may be set aside;[2] and this may be learned by examination of the jury as to the grounds and motives of their finding.[3]

§ 254. **Jury of viewers.** — Although a view of the premises is generally given, and frequently required to be made, by statute, yet the absence of such a provision does not prevent a view by the jury, in the discretion of the court.[4] On the other hand, the court may refuse such view without error.[5] A view is suggested, in some cases, as eminently proper.[6] Viewers should be attended, in their view, by an officer.[7] A jury of view do not decide, necessarily, on evidence furnished by the parties, but may find on their own judgment.[8] The report of viewers should show the conveniences to the public and the inconveniences to the owner, so that it can be determined whether there is a public necessity for the improvement.[9] The jury may view the premises, to thoroughly understand the testimony concerning it, although it is denied that they can consider as evidence the impressions derived from a view of the premises.[10] If counsel accompany a jury to view the premises, and consent to conclude the trial, they cannot afterward raise the point that the jury did not have a full view of the premises.[11] In Tennessee, a jury of view is not au-

[1] Columbia Bridge Co. *v.* Geisse, 36 N. J. L. 537; *s. c.*, 35 N. J. L. 558; Remy *v.* Municipality, 12 La. An. 657.

[2] Coster *v.* New Jersey R. R., 24 N. J. L. 780.

[3] Tide-Water Co. *v.* Archer, 9 Gill & J. 479.

[4] King *v.* Iowa Midland R. R., 34 Iowa, 458.

[5] Snow *v.* Boston R. R., 65 Me. 230; Evansville R. R. *v.* Cochran, 10 Ind. 560. Such evidence cannot conveniently be carried up.

[6] Remy *v.* Municipality, 12 La. An. 659.

[7] Patchin *v.* Brooklyn, 2 Wend. 377.

[8] Harper *v.* Lexington R. R., 2 Dana, 227.

[9] Peck *v.* Whitney, 6 B. Mon. 117.

[10] Heady *v.* Vevay Turnpike, 52 Ind. 117; Evansville R. R. *v.* Cochran, 10 Ind. 560.

[11] Oregon R. R. *v.* Oregon Steam Nav. Co., 8 Oreg. 178.

thorized to call witnesses, and should not hear the evidence of witnesses.[1]

§ 255. **Proceedings before the jury — Practice — Evidence.** — A sheriff's jury may be left in charge of a deputy-sheriff,[2] and the deputy may empanel the jury and administer the oath.[3] A jury to assess damages is not to pass upon the title to property.[4] A petition for a sheriff's jury cannot be amended at the hearing before the sheriff's jury.[5] The owner has a right to be heard and to offer evidence before the jury, both on the question of necessity and of damages.[6] The jury is not to pass on the admissibility of evidence. The court or officer in charge is alone authorized to do that.[7] The jury are to be charged by the sheriff or deputy in charge.[8] A civil engineer may exhibit a plan to the jury, showing the lots and the number of feet taken from each, and the memorandum may properly be given to the jury for inspection.[9] A new juror cannot be empanelled in place of an absent juror, when the examination has been partially concluded.[10]

§ 256. **Decision of majority.** — In New York, jurors selected for the purpose of assessing damages are not like jurors in ordinary criminal or civil trials. Their verdicts need not be unanimous, but a majority may decide, and make a valid report.[11] The opposite doctrine is held in

[1] Stevens v. Duck River Co., 1 Sneed, 237.
[2] Tripp v. Commissioners, 2 Allen, 556.
[3] Stevens v. Duck River Co., 1 Sneed, 237.
[4] Davidson v. Boston R. R., 3 Cush. 91.
[5] Perry v. Sherborn, 11 Cush. 388.
[6] Paul v. Detroit, 32 Mich. 108.
[7] Merrill v. Berkshire, 11 Pick. 269.
[8] Owen v. Jordan, 27 Ala. 608.
[9] Neff v. Cincinnati, Sup. Ct. Commission (Ohio), 6 Cent. L. J. 156.
[10] Gilkerson v. Scott, 76 Ill. 509.
[11] Cruger v. Hudson River R. R., 12 N. Y. 190; Broadway Widening, 63 Barb. 572; Astor v. Mayor of New York, 5 Jones & Sp. 539.

Michigan,[1] and in Georgia a new jury must be called in case of a disagreement.[2]

§ 257. **Itemizing verdict — Averaging.** — Damages may be properly itemized, and then the court can allow the proper items without setting aside the verdict.[3] The jury cannot add up the amounts testified to, and divide by the number of witnesses, and call the quotient their verdict.[4] They may average the testimony by a consideration of all the matters in testimony, and a consideration of the character of the witnesses, and their means of knowledge, but not by a simple division.[5]

§ 258. **Conditions in verdicts.** — The verdict of a jury may properly contain a condition extending to the owner time in which to remove houses, fences, trees, etc., from land.[6] But the verdict cannot be in favor of the utility of the road in case the applicants should construct the road, otherwise not. There would be no road established under such a finding.[7] The judgment should be for a certain and definite sum; and the verdict cannot find a certain sum to be paid in case the railroad made a certain culvert, and a larger sum in case they did not. An execution could not be issued on such a judgment, and the finding should be of such certainty that an execution may be issued on it.[8] Conditions cannot be imposed upon the parties against their wills.[9]

§ 259. **Setting aside verdict of jury.** — The verdict of a jury may be set aside on error apparent on the face of

[1] Paul *v.* Detroit, 32 Mich. 108; Chicago R. R. *v.* Sanford, 23 Mich. 418.
[2] Hicks *v.* Foster, 32 Ga. 414.
[3] Fitchburg R. R. *v.* Boston R. R., 3 Cush. 58.
[4] Peoria R. R. *v.* Birkett, 62 Ill. 332.
[5] Peoria R. R. *v.* Birkett, 62 Ill. 332.
[6] Dwight *v.* Springfield, 6 Gray, 442; Omaha R. R. *v.* Menk, 4 Neb. 21.
[7] Wilson *v.* Whitsell, 24 Ind. 306.
[8] Winchester R. R. *v.* Washington, 1 Rob. (Va.) 67.
[9] *Ante*, § 112.

the record, or misconduct of jury, or because the jury has been tampered with,[1] or because the verdict is against the weight of evidence.[2] Although there is no provision for preserving the evidence, the court may use any authentic manner of bringing such evidence before it.[3] The inquiry must be full and intelligent, and if conducted in a defective or negligent manner, so as to show that the damages have not been properly inquired into, the verdict will not be sustained. If it can be shown that proper items of damages were ignored by the jury, the verdict ought to be set aside.[4] The affidavit of a juror is not admissible, on a motion to set aside the verdict, to show that after the trial he has a different conception of the law, or of the facts, from that under which the verdict was given.[5]

§ 260. **Reassessment by jury.** —There may be a reassessment by a jury, although the first assessment was by commissioners. A refusal to grant a reassessment in a proper case will render the supervisors liable in damages.[6]

[1] Walker *v.* Boston R. R., 3 Cush. 1.

[2] Fitchburg R. R. *v.* Eastern R. R., 6 Allen, 98. But see Brown *v.* Ipswich Manufacturing Co., 5 Gray, 460.

[3] Fitchburg R. R. *v.* Eastern R. R., 6 Allen, 98.

[4] Walters *v.* Houck, 7 Iowa, 72.

[5] Oregon R. R. *v.* Oregon Steam Nav. Co., 3 Oreg. 178.

[6] Clark *v.* Miller, 54 N. Y. 528; *s. c.*, 42 Barb. 255.

CHAPTER XXIII.

OF PARTIES TO PROCEEDINGS.

§ 261. Joinder of defendants.
262. Tenants in common.
263. Joint interests.
264. Town a proper party.
265. Parties pursuing statutory authority not tort-feasors.
266. Equity may bring in all parties.
267. Separate assessments, verdicts, and appeals.
268. Who may appeal.
269. Who are "interested or aggrieved" — Interest of tax-payers.

§ 261. **Joinder of defendants.** — There is no reason why all the persons who sustain damages should not be joined in one proceeding. Such a mode of procedure commends itself by its cheapness and convenience, and cannot injure the interest of any one concerned, provided the damage is assessed to each owner separately. An assessment thus made must be regarded as a separate inquiry for each owner of the land.[1] Otherwise, each owner might exercise his right of challenging, and thus render it impossible to obtain a jury.[2] A lessor and lessee would be regarded together as the owner of the land, and would not be entitled to a separate inquiry as to their separate interests in the parcel.[3] If the statute provided that any number of residents of the county or circuit might be joined as defendants, that would exclude all non-residents from that petition, and such proceedings against non-residents would be set aside, on timely application. The statutory remedy must be strictly followed.[4]

[1] McKee *v.* St. Louis, 17 Mo. 184.
[2] Giesy *v.* Cincinnati, 4 Ohio St. 308.
[3] Kohl *v.* The United States, 91 U. S. 367.
[4] Quincy R. R. *v.* Kellogg, 54 Mo. 384.

§ 262. **Tenants in common.** — The title of tenants in common being joint, they should all join in proceedings to have damages assessed. Suit cannot be brought by one alone. If such suit was allowed, there would be several trials, and contradictory verdicts as to the value of the same land.[1] There should be one trial for each tract of land condemned, but not separate trials for the separate interests of joint owners. Joint owners should be joined in proceedings brought against them to condemn the lands.[2] A tender to one of tenants in common, acting for others, is a sufficient tender as to all;[3] but a payment to one is not a payment to all, unless all consent.[4] When property of one tenant in common is condemned by a railroad, the railroad does not thereby become a tenant in common as to the others.[5] A subsequent partition cannot affect the right of the company, when the damages had already been paid to the sheriff. All conveyances made afterward were made subject to the right of way so acquired. Nothing remained to be determined on appeal, except the question as to whether the damages assessed should be increased or diminished.[6]

§ 263. **Joint interests.** — Where there are joint interests in property, all those having an interest should be joined;[7] and if they appear jointly and demand a jury, they cannot afterward object that their interests were not separately considered, and an undivided sum may be awarded to them.[8] The assessment having been made to two jointly, one cannot appeal without uniting the other, or making

[1] Tucker v. Campbell, 36 Me. 346; Merrill v. Berkshire, 11 Pick. 269.
[2] Whitcher v. Benton, 48 N. H. 157. But see Dyckman v. Mayor of New York, 5 N. Y. 434.
[3] Dyckman v. Mayor of New York, 5 N. Y. 434.
[4] Brinckerhoff v. Wemple, 1 Wend. 470.
[5] Weston v. Foster, 7 Metc. 297.
[6] Ruppert v. C. O. & St. Joe R. R., 48 Iowa, 490.
[7] Ashby v. Eastern R. R., 5 Metc. 368.
[8] East Saginaw R. R. v. Benham, 28 Mich. 459.

him a party by notice or otherwise.[1] An objection that separate assessments should have been given to two undivided interests comes too late after verdict;[2] or that separate parcels should be considered, when a verdict in gross had been rendered.[3] A holder of an undivided interest cannot move to set aside the report as to his interest alone, but in reference to the whole tract in which he has an interest. Otherwise, if his interest should be found to be greater than on the former hearing, the company would be compelled to pay a greater amount for one share, although the interests of the parties stood just as before.[4]

§ 264. **Town a proper party.** — There is an interest in the town or community through which a road is to be laid, as well as in the petitioner for such road. The town will have to levy taxes for the construction and maintenance of the road, and should have some voice in preventing the laying-out of injudicious and uncalled-for roads. Hence, in the eastern states, the town should be treated as a party, and should receive notice of proceedings.[5] The damages found are in the nature of a judgment, and no party can be bound by a judgment without notice. The town may appeal, and demand a jury.[6]

§ 265. **Parties pursuing statutory authority not tort-feasors.** — At common law, either of tort-feasors could be sued for damages separately. Statutes allowing condemnation relieve the officers from actions of tort,[7] and they should be sued jointly, and not separately.[8]

[1] Chicago R. R. *v.* Hurst, 30 Iowa, 73.
[2] Knauft *v.* St. Paul R. R., 22 Minn. 173.
[3] Lake Superior R. R. *v.* Greve, 17 Minn. 322.
[4] Southern Pacific R. R. *v.* Wilson, 49 Cal. 396.
[5] Williams, petitioners, 59 Me. 517; Thetford *v.* Kilburn, 36 Vt. 179; Hinckley, petitioner, 15 Pick. 447.
[6] La Croix *v.* Medway, 12 Metc. 123; Laneeborough *v.* Berkshire, 22 Pick. 278.
[7] South Carolina R. R. *v.* Steiner, 44 Ga. 546.
[8] Hill *v.* Baker, 28 Me. 9.

§ 266. **Equity may bring in all parties.** — In Georgia, it is suggested that a court of equity may take jurisdiction over various suits for damages brought against railroads in streets, by bill of peace, and adjust their equities and rights by one decree;[1] but this course has never been taken in any reported case.

§ 267. **Separate assessments, verdicts, and appeals.** — Each owner is entitled to a separate assessment of his lots, and cannot be bound by an assessment of a block in which his lots are, when the value of the lots varies.[2] Juries, in passing on various claims for damages, should find separate verdicts, so that the verdicts in the cases in which they agree may be confirmed, and new trials can be had where they disagree.[3] The jury cannot find a gross amount for a strip of land taken which belongs to several owners. The land may vary in quality and value. Some lots may be ruined by the improvement, while others will be scarcely injured. There must be a separate consideration of each several parcel.[4] The appeals are to be separate. No individual has the right to disturb the assessment made as to any one else except himself. The fact that one owner appeals cannot enure to the benefit of one not appealing.[5] There may be separate interests in the same tract, and each is entitled to separate consideration,[6] and the compensation of all is not to be assessed in one sum.[7]

§ 268. **Who may appeal.** — Only those whose rights have been disregarded may appeal. There can be no appeal for errors affecting only those who do not appeal.[8]

[1] South Carolina R. R. *v.* Steiner, 44 Ga. 546.

[2] Sharp *v.* Johnson, 4 Hill, 92.

[3] Lanesborough *v.* Berkshire, 22 Pick. 278; Smith *v.* Connelly, 1 T. B. Mon. 58.

[4] Chicago R. R. *v.* Sanford, 23 Mich. 418.

[5] McKee *v.* St. Louis, 17 Mo. 184.

[6] Abrahams *v.* Mayor of London, 37 L. J. (Ch.) 782.

[7] Rex *v.* Trustees of Roads, 5 Ad. & E. 563.

[8] The State *v.* Richmond, 26 N. H. 232; Pickford *v.* Lynn, 98 Mass. 491;

Even if an act is plainly an encroachment on the rights of others, it is presumed that the party injured consents, unless he himself objects; and no one else can object for him.[1] Want of notice to other parties cannot be taken advantage of by those who have received notice;[2] nor can a deviation in the route, at some other point than on complainant's land,[3] or a deviation caused by the complainant himself, be complained of.[4] An individual who has had an award of his own damages cannot object that there has been no finding as to others.[5] There is a line of cases which indicate that in matters of public moment, like that of laying out a road, irregularities may be brought to the notice of the court by others than those whose lands are taken. The public should not be saddled with maintaining unnecessary roads, and hence defects may be insisted on, in proceedings, affecting others only who do not complain.[6] Proceedings may be considered as an entirety, and valid as to all or valid as to none.[7]

§ 269. **Who are "interested or aggrieved" — Interest of tax-payers.** — The interest of those "interested or aggrieved" does not embrace every citizen, but only those who are peculiarly concerned on account of some special interest not common to others.[8] They must be proprietors of land affected, and not simply members of the community.[9]

Hingham Bridge *v.* Norfolk, 6 Allen, 353; Supervisors *v.* Gorrell, 20 Gratt. 484.

[1] Hingham Brigde *v.* Norfolk, 6 Allen, 353; Wellington, petitioner, 16 Pick. 87; Anderson *v.* Turbeville, 6 Coldw. 150; Clifford *v.* Eagle, 35 Ill. 444.

[2] Nichols *v.* Salem, 14 Gray, 490.

[3] Newton *v.* Agricultural Branch R. R., 15 Gray, 27.

[4] The State *v.* Woodward, 9 N. J. L. 21.

[5] Clifford *v.* Eagle, 35 Ill. 444.

[6] Appleby Road, 1 Grant, 448; The State *v.* Woodruff, 36 N. J. L. 204; The State *v.* Cake, 24 N. J. L. 516; The State *v.* Emmons, 24 N. J. L. 45. But see The State *v.* Blauvelt, 34 N. J. L. 261.

[7] Brush *v.* Detroit, 32 Mich. 43.

[8] Goldman *v.* Justices, 3 Head, 107.

[9] Creswell *v.* Commissioners, 24 Ala. 282.

Only petitioners and remonstrators can question the jurisdiction in road proceedings.[1] They need not reside immediately upon the line of the road or proposed change, but must reside in the vicinity, within reasonable distance, so as to be injuriously affected by the change.[2] A person who lives so near that he may be compelled to work on the road has not sufficient interest to justify him in suing out a *certiorari* to revise the proceedings of commissioners.[3] Tax-payers, as such, do not have sufficient interest to interfere.[4]

[1] Canyonville Road *v.* Douglas County, 5 Oreg. 280.
[2] Wilson *v.* Whitsell, 24 Ind. 306.
[3] Parnell *v.* Commissioners, 34 Ala. 278.
[4] Supervisors *v.* Gorrell, 20 Gratt. 484; Southern Boulevard, 3 Abb. Pr. (N. S.) 447. But see The People *v.* Cortelyou, 36 Barb. 164.

CHAPTER XXIV.

OF PROCEEDINGS IN OPENING HIGHWAYS AND STREETS.

§ 270. Application for road.
271. Petition of householders or freeholders.
272. Refusal of officers to lay out roads.
273. Road an encumbrance on land.
274. Ability of public to maintain road.
275. Public necessity — Public convenience.
276. Extent of easement.
277. Description of road.
278. *Termini* should be certain.
279. *Terminus* need not be on highway.
280. Course of road.
281. Widening and straightening roads and streets.
282. Alteration of road.
283. The road must be laid out as petitioned for.
284. The road must be built as laid out.
285. Entry on adjoining land — Removal of fences.
286. Certificate of opening.

§ 270. **Application for road.** — No particular form of words is required in an application for a road, and the greatest technical accuracy and precision is not to be expected. Jurisdiction does not fail because the word "road," instead of "highway," is used in the petition or record.[1] The word "street" and "road" are synonymous.[2] The application should be in writing.[3] The petition should show the place of beginning, intermediate

[1] Windham *v.* Commissioners, 26 Me. 406.

[2] Fitzwater Road, 4 Serg. & R. 106. The word "street" applies to and includes any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and the parts of any such highway. London, Chatham, etc., Rail. Co. *v.* Mayor of London, 19 L. T. (N. S.) 250; Local Board of Health *v.* Jones, 26 L. J. (Exch.) 33.

[3] Pritchard *v.* Atkinson, 8 N. H. 335.

points, and *terminus*,[1] and should show the names of owners or occupants of land, or the board may not act on the same.[2] It is no objection that proceedings were carried on in the name of one who was named in the petition, but who did not actually sign it, if the signers were sufficient in number.[3] Improper inducements to parties to apply for roads — as, that damages shall in any event be paid to them — will render proceedings void.[4]

§ 271. **Petition of householders or freeholders.** — The propriety of establishing country roads is frequently made to depend upon the desire expressed by those whose lands are to be affected, or whose convenience is to be advanced by the establishment of the road. The application of these householders or freeholders is the foundation of the order for opening the road, and the record should show such petition, as jurisdiction will not otherwise attach.[5] As to the question whether the record should show whether or not the petitioners were freeholders, there is a division of opinion, the Supreme Court of Indiana[6] holding that the fact may be shown on the hearing, and the Supreme Court of Kansas[7] holding that the record should show the fact. The jurisdiction is not lost by one of the freeholders dismissing the proceedings as to himself. Jurisdiction cannot be defeated after it has once attached.[8] Unmarried men keeping houses and servants are "householders," and may make valid petitions in road matters.[9]

[1] Johns *v.* Marion County, 4 Oreg. 46.
[2] Hays *v.* Campbell, 17 Ind. 430.
[3] Hays *v.* Parrish, 52 Ind. 132.
[4] The State *v.* Stout, 38 N. J. L. 42.
[5] Jefferson County *v.* Cowan, 54 Mo. 284; Robinson *v.* Mathwick, 5 Neb. 252; Doody *v.* Vaughn, 7 Neb. 28.
[6] Brown *v.* McCord, 20 Ind. 270.
[7] Board of Commissioners *v.* Muhlenbacher, 18 Kan. 129; Oliphant *v.* Commissioners of Atchison County, 18 Kan. 386.
[8] Little *v.* Thompson, 24 Ind. 146.
[9] Kramer *v.* Clatsop County, 6 Oreg. 288.

§ 272. **Refusal of officers to lay out road.** — On the unreasonable refusal of municipal officers to lay out the road, the commissioners of the county may be called upon to lay out such road. The petition must show distinctly that the refusal was unreasonable.[1] If commissioners refuse to lay out a road, that is no ground for refusing to entertain a new petition. What may seem to be unnecessary and inconvenient at one time may at some subsequent time be manifestly both necessary and convenient. The dismissal of proceedings does not operate as a bar.[2]

§ 273. **Road an encumbrance on land.** — The existence of a road on land is an encumbrance upon it,[3] — a breach of a covenant of warranty. For an old location, damages may be recovered on the warranty. For a new location, damages must be claimed from the public, notwithstanding the new location was to take the place of the old road discontinued. If a part only was discontinued and newly located, the damages should be divided, and be sought both from the public and the covenantor.[4]

§ 274. **Ability of public to maintain road.** — In determining whether an occasion exists for a new highway, the legislature allows other considerations besides the public exigency to enter. There is a burden on the town through which the road will run, of constructing and maintaining the road. It is not proper that a few individuals shall, by simple petition, impose upon the public the burden of a useless road, and hence the town may object;[5] and for this purpose may show its financial condition and its tax-list

[1] Goodwin v. Commissioners, 60 Me. 328; Treat v. Middletown, 8 Conn. 243.

[2] Kramer v. Clatsop County, 6 Oreg. 238.

[3] Hampton v. Coffin, 4 N. H. 517; Herrick v. Moore, 19 Me. 313.

[4] Herrick v. Moore, 19 Me. 313.

[5] Stinson v. Dunbarton, 46 N. H. 385; Dudley v. Cilley, 5 N. H. 558; Linblom v. Ramsey, 75 Ill. 246.

as a reason why the road should not be laid out.[1] The ability of the public to build a road may be affected by the fact that private individuals will bear the expense, and this should be considered.[2] After the road has been declared to be one of public necessity, it cannot be shown, on appeal, as a reason that it was not of convenience or necessity, that the expense, as shown by a reassessment, would be too great. The court will not try that question, or permit it to be tried, twice.[3]

§ 275. **Public necessity—Public convenience.**—In many states, there is a provision that there shall be a finding by a jury, committee, commissioners, or by the court, of the public convenience or necessity of the proposed road.[4] Such commissioners decide on evidence satisfactory to themselves, and may take testimony and hear evidence which might not be strictly admissible in a case on trial before a court.[5] A finding that public convenience requires a highway is equivalent to a finding that it is necessary.[6] A report that there was occasion for such a road is sufficient. Such reports are not to be drawn up with the precision of an indictment.[7] A finding that the taking is needful for the proposed undertaking is not sufficient to show that it is for the use or benefit of the public;[8] and a finding that the taking is for public use is not a finding of the necessity of the taking for public use. The finding of the necessity cannot be dispensed with.[9] A finding that it is

[1] Bristol v. Branford, 42 Conn. 321.
[2] Hunter v. Newport, 5 R. I. 325.
[3] Plainfield v. Packer, 11 Conn. 576.
[4] Arnold v. Decatur, 29 Mich. 77; Horton v. Grand Haven, 24 Mich. 465; Bristol v. Branford, 42 Conn. 321.
[5] Bristol v. Branford, 42 Conn. 321.
[6] Hunter v. Newport, 5 R. I. 325.
[7] Pocopson Road, 16 Pa. 15.
[8] Mansfield R. R. v. Clark, 23 Mich. 519; Grand Rapids R. R. v. Van Driele, 24 Mich. 409.
[9] McClary v. Hartwell, 25 Mich. 139.

necessary to take said real estate for public use is sufficient.[1] A finding of the necessity is a jurisdictional fact, without which all further proceedings are void.[2] The necessity is not that the particular land is necessary, but that the public improvement is necessary.[3] The public necessity depends to a considerable extent on the finances of the municipality, and whether they will justify a new road.[4] The necessity cannot be found conditionally, — as, that the road would be of public utility in case the applicants constructed the road at their own expense.[5] The petition should contain allegations sufficient to support the inference that it would be of convenience and necessity.[6] It is sufficient adjudication that the road is public, that the viewers lay it out for public use.[7] If the public necessity is not manifest, and the private inconvenience great, or if the private inconvenience overbalances the public necessity, the road will not be laid out.[8] It is a sufficient necessity for changing an old road, and making a new one, that the old one had been rendered dangerous by proximity to a railroad.[9] The public utility of a road laid on the right of way of a railroad is doubtful, especially if it was laid out under the impression that no damages were to be paid to the railroad when compensation was properly claimed.[10]

§ 276. **Extent of easement.** — The public have a right to use the whole of the highway, and may remove door-

[1] East Saginaw R. R. v. Benham, 28 Mich. 459.
[2] The People v. Town of Seward, 27 Barb. 94.
[3] Powers' Appeal, 29 Mich. 504; The People v. Brighton, 20 Mich. 57.
[4] Linblom v. Ramsey, 75 Ill. 246.
[5] Wilson v. Whitsell, 24 Ind. 306.
[6] Windsor v. Field, 1 Conn. 279; Lockwood v. Gregory, 4 Day, 407.
[7] App's Road, 17 Serg. & R. 388.
[8] McWhirter v. Cockrell, 2 Head, 9; Poston v. Terry, 5 J. J. Marsh. 220; Fletcher v. Fugate, 3 J. J. Marsh. 631.
[9] Helm v. Short, 7 Bush, 623.
[10] Crossley v. O'Brien, 24 Ind. 325.

steps, eaves-spouts, and bay-windows projecting over the land taken. Hence damages should be allowed for the right of the public to remove, and there should be no reduction of damages on the ground that the public will not insist on the right.[1] The public generally have the right of using the road, although a particular town may pay for the road. The easement does not belong to the particular town, but to the general public.[2] For a further discussion of the extent of the public easement in roads and streets, see *ante*, §§ 51–56.

§ 277. **Description of road.** — The description of the land proposed to be taken for a road should be sufficiently distinct to ascertain the *termini* and general course.[3] It is not necessary that the report of the commissioners should describe the road in the same language used in the petition, provided there is substantial compliance.[4] If the width is not fixed, but the commencement, courses, and distances on each person's land are given, and the quantity taken from each, it is sufficient.[5] The description must be accurate, although no one is misled by the description given.[6] The description must be reasonably certain. It was not designed that the petitioners should have the proposed route surveyed, and that the line, and every point on the route and at the ends of the route, should be inserted in the petition. The proceeding was intended to be practical, so that the common highways of the country might be established without the employment of a corps of scientific men for the purpose, but that the roads might be established by ordi-

[1] Hyde *v.* Middlesex, 2 Gray, 267.

[2] Galen *v.* Plank-Road Co., 27 Barb. 543.

[3] Sumner *v.* Commissioners, 37 Me. 112; Lewiston *v.* Commissioners, 80 Me. 19.

[4] Windham *v.* Commissioners, 26 Me. 406.

[5] Windsor *v.* Field, 1 Conn. 279.

[6] Johns *v.* Marion County, 4 Oreg. 46.

nary practical business men; and hence, after the public have been in the enjoyment of a public highway for almost a quarter of a century, the laying-out cannot be held invalid for technical inaccuracies in description.[1]

§ 278. **Termini should be certain.** — The certainty with which the *termini* should be stated cannot be set forth in a proposition, but can only be derived from examples which show instances considered to be certain or uncertain. The failure to state *termini* with certainty can be reached by *certiorari*.[2] A description of a road as being from a certain point, and "thence southerly to Cocheco River, to low-water mark," is void for uncertainty.[3] A road described as "beginning near the New Jersey Central Railroad depot, on the northerly side of said depot," does not define the beginning with requisite certainty.[4] "Beginning at a stake in a road, and ending at a stake in another road," is not sufficient where no such stakes are set up.[5] The *termini* should be certain, but need not be fixed with mathematical precision, and the beginning stake need not stand in the exact centre of the road.[6] Beginning at or near a described point, and terminating at or near a described point, is not too indefinite.[7] It is too indefinite to state one *terminus* as on the state line in section 13, when the said section has a boundary of one mile on the state line;[8] or at a corner between the north-west and north-east quarters of a certain section, without designating which of the corners.[9] "Commencing at a quarter-post between Sections 9 and 10, Township 31, R. 10, on the land owned by A., and running

[1] Henline *v.* The People, 81 Ill. 269.
[2] Road in Lower Merion, 58 Pa. 66.
[3] Clement *v.* Burns, 43 N. H. 609.
[4] The State *v.* Woodruff, 36 N. J. L. 204.
[5] The State *v.* Green, 18 N. J. L. 179.
[6] The State *v.* Van Buskirk, 24 N. J. L. 86.
[7] The State *v.* Northrop, 18 N. J. L. 271.
[8] Shute *v.* Decker, 51 Ind. 241.
[9] Farmer *v.* Pauley, 50 Ind. 583.

through the lands of A. and B. to a quarter-post between Sections 15 and 16, and thence to terminate at the intersection of the road to C.," is sufficient. The court will take judicial notice of sections and township lines, and established roads and corners,[1] and of the geography of the state and the course of rivers,[2] and that a township of a certain number must be north or south when only one such township is in the county, and also that the line of the township coincides with the section line.[3]

§ 279. **Terminus need not be on highway.** — Roads are built for public use. The fact that one *terminus* is not on a public highway, but on a private way, does not exclude the public utility of the road. It is sufficient if the public, or many individuals, have access to it by owning the land at its *terminus*, or may use it by license.[4] Roads may terminate at toll-roads or wharves,[5] or on the state line, or on the bank of a private stream capable only of being used by small boats without loads,[6] or in a *cul-de-sac*,[7] or at navigable water where there is no landing, or on wild lands, or at mills and manufacturing establishments, or to connect with a road not yet built,[8] or at private ground,[9] or at a church or cemetery.[10] A highway may exist over a place which is not a thoroughfare, and may terminate in an open field at

[1] Mossman *v.* Forrest, 27 Ind. 233; Clifford *v.* Eagle, 35 Ill. 444.

[2] Hays *v.* The State, 8 Ind. 425.

[3] Kile *v.* Yellowhead, 80 Ill. 208.

[4] Boston R. R. *v.* Folsom, 46 N. H. 64; Hunter *v.* Newport, 5 R. I. 325; Peckham *v.* Lebanon, 39 Conn. 231; West Pikeland Road, 63 Pa. 471.

[5] Crosby *v.* Hanover, 36 N. H. 404.

[6] Watson *v.* South Kingstown, 5 R. I. 562.

[7] Peckham *v.* Lebanon, 39 Conn. 231; Rugby Charity *v.* Merriweather, 11 East. 375, *n.*; Bateman *v.* Bluck, 18 Q. B. 870. *Contra*, Stewart *v.* Hartman, 46 Ind. 331; Moll *v.* Benckler, 30 Wis. 584.

[8] Peckham *v.* Lebanon, 39 Conn. 231.

[9] The People *v.* Van Alstyne, 3 Keyes, 35; The People *v.* Kingman, 24 N. Y. 559 (overruling The People *v.* Van Alstyne, 32 Barb. 131, and Holdane *v.* Trustees, 23 Barb. 103).

[10] West Pikeland Road, 63 Pa. 471; Church Road, 5 Watts & S. 200.

the line between towns. The presence of such a fact should arrest the attention of the committee, and compel them to move with caution. The question of necessity is one of fact, to be settled by the triers of fact.[1]

§ 280. **Course of road.** — Unless the course of a road is designated by angles and distances, the commissioners have a discretion in laying out the same. A road that is to be run south-westerly between certain *termini* need not be made perfectly straight between the *termini*;[2] and may run over an old highway, if in the same general direction.[3] The description of the property may, for the portion over the old highway, be by reference to the old highway, as that is an established monument, and fully as accurate as courses and distances.[4] The description of the route should show the land to be taken, so that the land can be ascertained without extrinsic evidence.[5] An application for a road to run in "a north-westerly and northerly direction" is substantially complied with by a route in which are thirty-six courses, all north-westerly or northerly except two.[6] A party claiming damages for the laying-out of a road cannot introduce evidence to show that damages were assessed on a different route from that described in the order.[7] Viewers cannot locate a road upon another legally laid out and opened. But this may be done so far as it may be necessary to reach the point named in the order.[8]

§ 281. **Widening and straightening roads and streets.** — In straightening a road, compensation must be provided

[1] Goodwin *v.* Wethersfield, 43 Conn. 437.

[2] Flanders *v.* Colebrook, 51 N. H. 300; Wiggin *v.* Exeter, 18 N. H. 304.

[3] The People *v.* Commissioners of Milton, 37 N. Y. 360; Flanders *v.* Colebrook, 51 N. H. 103.

[4] The People *v.* Commissioners of Milton, 37 N. Y. 360.

[5] Rising Sun Turnpike *v.* Hamilton, 50 Ind. 580; Biddle *v.* Dancer, 20 N. J. L. 633.

[6] The State *v.* Hulick, 33 N. J. L. 307.

[7] Hallock *v.* Woolsey, 23 Wend. 328.

[8] Reserve Township Road, 80 Pa. 165.

for the new land taken.[1] The damages for widening a street would include damages for raising the level of a sidewalk, if rendered necessary by the actual widening of the street,[2] and for changes of grade rendered necessary.[3] The authority to widen streets includes authority to remove buildings.[4] A widening is rather an alteration than a new laying-out.[5] In widening and straightening a highway, the commissioners may depart entirely, for short distances, from the route of the old highway; and the fact that the road varied in some places four rods from the old road is no objection. There should not be such an abuse of discretion as to lay out a new road, on a petition to widen and straighten.[6]

§ 282. **Alteration in road.** — An alteration signifies a change in course or direction, and not in the mode of construction or the manner in which it is finished. A jury authorized to make alterations in a highway cannot determine that a railroad shall be carried over a road, by a bridge, or under it.[7] In altering a road, there cannot be such a deviation as to cross other land, or to enter towns not entered before, or to make a way which would actually be a new line of way.[8]

§ 283. **The road must be laid out as petitioned for.** — Commissioners must act on the petition before them, and cannot stop by laying out only a part of the road petitioned for.[9] The viewers and petitioners must concur on the entire location, otherwise there would be the establishment of a road for which no resident tax-payers had petitioned.[10]

[1] Beckwith *v.* Beckwith, 22 Ohio St. 180.
[2] Fall River Works *v.* Fall River, 110 Mass. 428.
[3] Van Riper *v.* Essex Public Road, 38 N. J. L. 28.
[4] Patchin *v.* Brooklyn, 2 Wend. 377.
[5] The People *v.* McNeil, 2 N. Y. Sup. Ct. 140.
[6] The State *v.* Canterbury, 40 N. H. 307.
[7] Boston R. R. *v.* Middlesex, 1 Allen, 324.
[8] Gloucester *v.* Essex, 3 Metc. 375; Merrill *v.* Berkshire, 11 Pick. 269.
[9] The People *v.* Board of Spring Wells, 12 Mich. 434.
[10] Brannan *v.* Mecklenburg, 49 Cal. 672; Damrell *v.* San Joaquin County, 40 Cal. 154.

When a specific improvement is petitioned for, and its public necessity found by the viewers, it would be improper to allow the commissioners to make only a small fraction of the improvement, and to levy an assessment to pay for the same. The whole road must be laid out as petitioned for.[1]

§ 284. **The road must be built as laid out.** — No other road can be made than that which is laid out and approved. And when the overseer of roads is directed to follow the marked trees on the line of the road, the presumption is that the road, from one tree to another, should be in a straight line.[2] A deviation from the *terminus* as fixed by the commissioners renders proceedings null.[3] If a highway is laid from one *terminus* about one-half the distance to the other *terminus*, and terminates there, the highway cannot be said to be the highway petitioned for.[4] If there is an error in the description of the road laid out, the officers laying out the same may be required, by *mandamus*, to file a new certificate and give a correct description.[5] A minute variation will not render supervisors liable in trespass, if they act in an ordinarily prudent and careful manner. *De minimis non curat lex.*[6] The road need not be laid out its full width. Failure to lay out full width does not invalidate the laying-out, especially where the statute prescribes a *minimum* width. If no width was mentioned, that would be presumed to be the width.[7]

§ 285. **Entry on adjoining land — Removal of fences.** — When persons engaged in making the road necessarily

[1] Robinson *v.* Logan, 31 Ohio St. 466.
[2] Butler *v.* Barr, 18 Mo. 357.
[3] Shinkle *v.* Magill, 58 Ill. 422.
[4] Ford *v.* Danbury, 44 N. H. 388; Linblom *v.* Ramsey, 75 Ill. 246.
[5] Woolsey *v.* Tompkins, 23 Wend. 324.
[6] Brown *v.* Bridges, 31 Iowa, 138.
[7] Pearce *v.* Gilmer, 54 Ill. 25.

enter on adjoining land, they are not liable in trespass if they do no unnecessary damage, or if the cattle used in throwing up the road stray on the land against the will of the owner.[1] Throwing earth against the side of the fence, if unreasonable or unnecessary, would give an action on the case for damages;[2] and an entry to make a ditch for carrying off water would be a trespass.[3] The surveyor of highways may remove a fence without first notifying the owner to remove it.[4]

§ 286. **Certificate of opening.** — The certificate of opening is the final and best evidence of the opening of the road. Until that is filed, the owner has a right to keep his land inclosed.[5] The certificate is the official act of opening, and any disturbance of the owner in his possession before that is done is a trespass.[6]

[1] Cool *v.* Crommet, 13 Me. 250.
[2] Felch *v.* Gilman, 22 Vt. 38.
[3] Plummer *v.* Sturtevant, 32 Me. 325.
[4] Cool *v.* Crommet, 13 Me. 250.
[5] Emerson *v.* Reading, 14 Vt. 279; Patchen *v.* Morrison, 3 Vt. 590.
[6] Evans *v.* James, 4 Wis. 408.

CHAPTER XXV.

OF PROCEEDINGS UNDER THE MILL ACTS.

§ 287. Public character of mills.
288. Necessity of mill — Private inconvenience.
289. Effect upon health — Rights of fishery.
290. Conflicting applications — Improvement by owner — Prescriptive rights.
291. Mill act excludes common-law remedy.
292. Where the statutory remedy is not adequate — Failure to comply with statute.
293. Act protects from indictment.
294. How damages are determined.
295. Questions before the jury — Nature of damages.
296. Damages to mill-site — Damages below dam.
297. Damages not authorized by charter.
298. Inconveniences.
299. Annual damages.
300. Benefits to be considered.
301. Use by owner of lands flowed.
302. Reservoir for dam — Outlets.
303. Height of mill-dam.
304. Mill must be built.
305. All owners of mills to be joined — Owners of lands.
306. Transfer of dam — Liability of vendee of dam.
307. Transfer of land flowed — Claim for damages by vendor and vendee.
308. Regularity of proceedings — Waiver of errors.
309. Abandonment of proceedings.
310. Limitations on actions and on payment of damages.

§ 287. **Public character of mills.** — The reasons for encouraging mills in the early times, when mills were few and capital small, have largely ceased to exist, and there is now no reason for indulging owners of mills over owners of public groceries, or other branches of business.[1] There are, however, a number of states which continue to recognize the erection of a mill as of sufficient public interest and im-

[1] Jordan *v.* Woodward, 40 Me. 317.

portance to justify the exercise of eminent domain.[1] In order to make the mill a public use, the public should have the control of it. There should be regulations requiring the owners to grind for the public at rates to be fixed by the legislature, and that the mills should be prepared to grind at all reasonable times. If there be no such provisions, the mills would be a private use, and flowing of private property could not be sustained as a proper exercise of eminent domain.[2] In most of the states where the acts are sustained, the mills are required to grind for all in turn, and at regular tolls.[3]

§ 288. **Necessity of mill — Private inconvenience.** — In Kentucky, the court considers the question of the necessity of the public demand for a new mill; and if the private inconveniences overbalance the public necessity, or the public is already sufficiently supplied, the application to erect a new mill will be refused.[4] When the return shows a private inconvenience, such as the destruction of a spring, and it it does not affirmatively appear that the public convenience requires the mill, the condemnation cannot be made.[5] It will be sufficient if the neighborhood is sufficiently supplied with mills, or that a man's house, orchard, or garden would be overflowed.[6] The question of the public utility of the mill is settled by the writ of *ad quod damnum*.[7] The jury must return whether or not out-houses, gardens, or orchards are overflowed.[8] In considering the question of necessity, it is not proper to discuss whether or not damages have been

[1] *Ante*, § 15.

[2] Tyler *v.* Beacher, 44 Vt. 648; Harding *v.* Goodlett, 3 Yerg. 41; Sadler *v.* Langham, 34 Ala. 311; Bottoms *v.* Brewer, 54 Ala. 288.

[3] Crenshaw *v.* Slate River Co., 6 Rand. 245; Harding *v.* Goodlett, 3 Yerg. 41; Bottoms *v.* Brewer, 54 Ala. 288.

[4] McDougle *v.* Clark, 7 B. Mon. 448.

[5] Trabue *v.* Macklin, 4 B. Mon. 407; Payne *v.* Taylor, 3 A. K. Marsh. 328; Morgan *v.* Banta, 1 Bibb, 579; Willoughby *v.* Shipman, 28 Mo. 50.

[6] Morgan *v.* Banta, 1 Bibb, 579.

[7] Wright *v.* Pugh, 16 Ind. 106.

[8] Martin *v.* Rushton, 42 Ala. 289.

paid in proper amount, or that there were errors in the verdict of the jury, — as, that they had omitted proper items. Those questions should properly arise on motion to set aside the verdict of the jury.[1]

§ 289. **Effect upon health — Rights of fishery — Interference with buildings.** — Statutes ordinarily require a finding by the jury as to the effect of the proposed dam on the health of the community; and if the public health will probably be injuriously affected, then there shall be no permission to build the mill,[2] and any one whose health would be affected can oppose the application, and appeal.[3] A writ of *ad quod damnum* may be instituted by the owner of a mill already erected, to establish that the health of the community is not disturbed by his mill.[4] A failure to report as to the effect on the health of the community will reverse the report.[5]

The condemnation of lands for mill purposes does not operate to destroy the rights of fishery formerly enjoyed by the owners of the soil, and the legislature may properly require compensation to be paid to the owners.[6] The report should show whether or not fish of passage would be interfered with.[7] The Missouri statute does not permit of the erection of mills when the mansion-house of any proprietor, or the out-houses, curtilages, or gardens thereto immediately belonging, or the orchard, would be overflowed thereby. Under that statute, a spring-house would be considered an out-house.[8] Evidence as to healthfulness of a locality, as affected by a dam, must be of the comparative healthfulness

[1] Gammell *v.* Potter, 6 Iowa, 548.
[2] Mayo *v.* Turner, 1 Munf. 405; Wooten *v.* Campbell, 7 Dana, 204.
[3] Wooten *v.* Campbell, 7 Dana, 204.
[4] Wright *v.* Pugh, 16 Ind. 106.
[5] Gherkey *v.* Haines, 4 Blackf. 159.
[6] Holyoke Co. *v.* Lyman, 15 Wall. 500.
[7] Eubank *v.* Pence, 5 Litt. 338.
[8] Willoughby *v.* Shipman, 28 Mo. 50.

before and after the erection of the dam, — not simply after the erection of the dam.[1]

§ 290. **Conflicting applications — Improvement by owner — Prescriptive rights.** — The first applicant acquires an inchoate right to the privileges which are conferred by the statute, and, provided he proceeds with reasonable diligence, he is entitled to a decree establishing his mill. If applications are made on the same day, parol evidence is admissible to show which one came in first. An amended writ is entitled to the same time as the writ first filed. All parties are presumed to know of the applications filed, and must act accordingly.[2] The Connecticut statute gives to the owner of the mill-site the first privilege of improving it; and if it appears that a mill-dam has been erected and used, the site will be exempt from condemnation, unless by long-continued non-user the site is abandoned.[3] The indulgence of a reasonable time in which to improve the site is given to the owner or his vendee.[4] Flowing for twenty years without claim for damages gives an easement, which will not be lost by a non-user of less than twenty years.[5] Non-user for twenty years is an abandonment, giving a right to flow the site previously occupied.[6] When there are conflicting applications, the court may grant permission to the one which will cause the lesser damage to individuals.[7]

§ 291. **Mill act excludes common-law remedy.** — The common-law remedy against the owner of a mill for flowing

[1] Watson *v.* Van Meter, 43 Iowa, 76.

[2] Hendricks *v.* Johnson, 6 Port. 472. In Hook *v.* Smith, 6 Mo. 225, the court considered the fact that one application was made a few hours before the other to be of no importance.

[3] Curtiss *v.* Smith, 35 Conn. 156; Elting Woollen Co. *v.* Williams, 36 Conn. 310.

[4] Elting Woollen Co. *v.* Williams, 36 Conn. 310.

[5] Williams *v.* Nelson, 23 Pick. 141.

[6] French *v.* Braintree Mfg. Co., 23 Pick. 216.

[7] Hook *v.* Smith, 6 Mo. 225.

land by means of a dam is taken away by the mill acts, and recovery can only be had by the statutory remedy,[1] except in case of wrongful flowage.[2] Hence no action at law or in equity can be brought, nor can the cause of action be submitted to arbitration.[3] The mill acts were passed to prevent continual actions of trespass,[4] and to provide a mode of assessing all damages.[5] The mill acts must be strictly followed in every particular;[6] and if the owner builds his mill before asking for his writ, the petition will come too late to protect him from common-law actions.[7] No action will lie for a flowage back through a drain into a cellar, except under the mill act.[8] In Indiana, where the mill act contains no new remedy, but one cumulative only on one already existing at common law, and the statute is not affirmative, it is held that the common-law action is not excluded.[9]

§ 292. **When the statutory remedy is not adequate — Failure to comply with statute.** — If the statutory remedy is not adequate to fairly compensate the owner, the common-law remedy survives, — as, where the mill was in an adjoining state, and caused a flow over lands in Maine, the mill act could not be extended to such mill, and the owners would be liable at common-law.[10] If the owner of the mill, after pursuing the statutory remedy, refuses to comply with the requirements of the verdict, he would still be liable at

[1] Underwood *v.* North Wayne Co., 41 Me. 291; Wooster *v.* Great Falls Co., 39 Me. 246; Leland *v.* Woodbury, 4 Cush. 245; Fehr *v.* Schuylkill Nav. Co., 69 Pa. 161.

[2] Gile *v.* Stevens, 13 Gray, 146; Fehr *v.* Schuylkill Nav. Co., 69 Pa. 161.

[3] Henderson *v.* Adams, 5 Cush. 610.

[4] Gilliam *v.* Canaday, 11 Ired. 106.

[5] Gillet *v.* Jones, 1 Dev. & B. 339; Wilson *v.* Myers, 4 Hawks, 73; Munford *v.* Terry, 2 Car. L. Repos. 308.

[6] Shuckleford *v.* Coffey, 4 J. J. Marsh. 40.

[7] Smith *v.* Olmstead, 5 Blackf. 37.

[8] Cotton *v.* Pocasset Mfg. Co., 13 Metc. 429.

[9] Toney *v.* Johnson, 26 Ind. 382.

[10] Wooster *v.* Great Falls Co., 39 Me. 246.

common law, and the land-owner would not be confined to his remedy under the mill act.[1] Raising the water beyond the limit prescribed by the verdict, without new proceedings on the part of the mill-owner, would be a trespass at common law, and the action would[2] survive. In North Carolina, the mill act only gives damages for injury to land, and hence other damages, such as to health, must be recovered in an action at common law.[3] When the initiative of proceedings is given to the mill-owner, the owner of the land is left to his common-law remedy, or his equitable remedy, if the mill-owner fails to obtain necessary authority, or fails to make compensation.[4]

§ 293. **Act protects from indictment.** — The legislative authority to build dams protects from indictments for nuisance and for obstructing streams, but leaves the builders liable to common-law actions if compensation is not paid.[5] If the damages are not paid, and the company is insolvent, the owner may proceed to have the dam abated as a nuisance.[6]

§ 294. **How damages are determined.** — The question of damages can only be settled by the testimony of experts. It is competent to show a plan of the territory proposed to be flowed, and examine an expert on the extent of the damages.[7] It is competent to show the state of the land, the character of the soil, and the nature and value of the productions prior to the erection of the dam. Such

[1] Leonard *v.* Wading River Co., 113 Mass. 235; Winkley *v.* Salisbury County, 14 Gray, 443; Stowell *v.* Flagg, 11 Mass. 364.

[2] Winkley *v.* Salisbury County, 14 Gray, 443; Andover *v.* Sutton, 12 Metc. 182.

[3] Waddy *v.* Johnson, 5 Ired. 333.

[4] Hunting *v.* Curtis, 10 Iowa, 152.

[5] Easton *v.* Amoskeag Co., 44 N. H. 143; Hooksett *v.* Amoskeag Co., 44 N. H. 105; The State *v.* Mills, 29 Wis. 322; Pick *v.* Rubicon Co., 27 Wis. 433.

[6] The State *v.* Mills, 29 Wis. 322.

[7] Paine *v.* Woods, 108 Mass. 160; Hosmer *v.* Warner, 15 Gray, 46.

evidence is admissible although the dam has been erected twenty years.[1] Nominal damages may be recovered although no actual damages may be shown.[2] If damages are assessed after the erection of the dam, it is proper to include all actual damages, including those that might not have been foreseen at the time of the taking.[3] The payment of damages does not vest the title in the excess of lands flowed over the amount of land taken, the damages for which were assessed by the jury.[4]

§ 295. **Questions before the jury — Nature of damages.** — The jury are to determine the damages, and not the title. A jury presided over by a sheriff is not a proper tribunal to try questions of title, and hence such questions should be settled before the warrant for the jury issues.[5] A question of a prescriptive right is properly for the court, and not for the sheriff's jury.[6] The sheriff's jury is to determine the damages, because they examine into all the circumstances and view the premises; and hence the question of damages is not to be inquired into at the bar of the court.[7] The jury should include in the damages injury to fences, and for the annual expense of keeping them up;[8] and for interfering with the drainage, although no land is taken.[9] The damages are to the land, and not to the air, which may be filled with noxious vapors by the maintenance of the dam.[10] There is no damage to a riparian proprietor from simply deepening the water in the channel of the stream,

[1] Hosmer *v.* Warner, 15 Gray, 46.
[2] Wright *v.* Stowe, 4 Jones L. 516.
[3] Nash *v.* Upper Appomattox County, 5 Gratt. 382.
[4] Whitworth *v.* Puckett, 2 Gratt. 528.
[5] Darling *v.* Blackstone Mfg. Co., 16 Gray, 187.
[6] Wilmarth *v.* Knight, 7 Gray, 294.
[7] Nutting *v.* Page, 4 Gray, 581.
[8] Jones *v.* Phillips, 30 Me. 455.
[9] Johnston *v.* Roane, 8 Jones L. 523.
[10] Rooker *v.* Perkins, 14 Wis. 79.

when no land is overflowed, although such deepening would lessen the fall of a dam if erected on the land above.[1]

§ 296. **Damages to mill-site — Damages below dam.** — The erection of one dam frequently operates to destroy or impair a mill-privilege further up the stream. If, however, the site above is unimproved and unproductive, no damages will be allowed.[2] The first dam erected, or in process of erection, has the precedence, and cannot be interfered with by one subsequently erected.[3] A fall below the mill-site, not actually in use, but reserved as a means of increasing the power when needed, is a part of the mill-site, and cannot be destroyed by flowing back from below.[4] Damages resulting below the dam from flowing may be recovered under the mill acts.[5] There should be an examination of the land below as well as above the dam, to determine the damages accruing.[6]

§ 297. **Damages not authorized by charter.** — Where the flowage is greater than that authorized by charter, the remedy is by action at common law. Statutes do not provide for the consideration of acts outside of the chartered powers, and full damages may be recovered at common law for repairs rendered necessary by flowage, and for building a wall to protect from further flowage.[7] The act only provides for damages resulting from the proper erection and maintenance of the mill, and not for negligent and tortious acts.[8] If the mill is not built under the authority of the

[1] Hook *v.* Smith, 6 Mo. 225.

[2] Fuller *v.* Chicopee Mfg. Co., 16 Gray, 43.

[3] Bigelow *v.* Newell, 10 Pick. 348; Miller *v.* Stowman, 26 Ind. 143.

[4] Occum Co. *v.* Sprague Co., 35 Conn. 496.

[5] Gile *v.* Stevens, 13 Gray, 146; Honenstine *v.* Vaughan, 7 Blackf. 520.

[6] Martin *v.* Rushton, 42 Ala. 289.

[7] Andover *v.* Sutton, 12 Metc. 182. *Contra*, Fehr *v.* Schuylkill Nav. Co., 69 Pa. 161.

[8] Hill *v.* Sayles, 12 Metc. 142; Stowell *v.* Flagg, 11 Mass. 364; Johnson *v.* Kittredge, 17 Mass. 76; Fiske v. Framingham Mfg. Co., 12 Pick. 68.

mill acts, the courts will not interfere by injunction until the right of redress is established by an action at law, and until that action has proved unavailing.[1]

§ 298. **Inconveniences.** — Damages should be allowed for inconveniences resulting from cutting up lands into inconvenient parcels,[2] or for destroying fords which formerly rendered different parts of a farm accessible.[3] The damages would not necessarily be the cost of bridges, for the benefits accruing might reduce the damages.[4] Damages will be allowed for saturating the soil so that good crops cannot be produced,[5] and may include damages to cellar of dwelling-house; but no damages will be allowed for noxious smells arising from land flowed, and which render the uplands less desirable for residence.[6] If the inconveniences from cutting up the land could be remedied by making a new way, then the damages might be the cost of a new way; but if the value of the land is not sufficient to justify the building of a new way, then the damage would be the loss of productive value.[7]

§ 299. **Annual damages.** — Damages are allowed, by the Massachusetts Mill Act, for damages annually accruing, notwithstanding the mill may be destroyed. The owner may rebuild at any time.[8] These damages may be reassessed, while damages once given in gross can not. Hence, judgment for damages allowed for one year is not conclusive on the amount in future years.[9] In assessing damages for

[1] Arnold *v.* Klepper, 24 Mo. 278.

[2] Fuller *v.* Chicopee Mfg. Co., 16 Gray, 48; Palmer Co. *v.* Ferrill, 17 Pick. 58; Monson Mfg. Co. *v.* Fuller, 15 Pick. 554.

[3] Harding *v.* Funk, 8 Kan. 315.

[4] *Ibid.*

[5] Monson Mfg. Co. *v.* Fuller, 15 Pick. 554.

[6] Fuller *v.* Chicopee Mfg. Co., 16 Gray, 43; Eames *v.* New England Worsted Co., 11 Metc. 570.

[7] Bates *v.* Ray, 102 Mass. 458.

[8] Fuller *v.* French, 10 Metc. 359.

[9] Snell *v.* Bridgewater Co., 24 Pick. 296.

subsequent years, regard is to be had, not to the condition of the land as it may have been affected by maintaining the dam for several years, but to the condition of the land at the commencement of the injury.[1] In North Carolina, the annual damages are assessed to be paid for five years continuously, after which there is a new assessment.[2]

§ 300. **Benefits to be considered.** — The owner of the land may be benefited by the flowage. Ice may be formed, which is salable by the owner; water is supplied for the use of cattle, and for purposes of irrigation, etc. These benefits may go in reduction of damages.[3] Soil previously barren may be fertilized by the irrigation, and this benefit should be considered.[4] The general benefits which arise from increase of markets, establishment of schools, stores, etc., are too general to be admitted.[5] Such benefits are enjoyed equally by others, whose lands are not injuriously affected; and it is not proper that one should pay for the general benefit, while the other cannot be compelled to pay.[6]

§ 301. **Use by owner of lands flowed.** — The use of land flowed for mill purposes, by the owners of the mill, is not intended to exclude the use by the owner of the land, when the same will not interfere with the proper operation of the mill. The mill act was to enable a head of water to be raised; and hence the owner may make a boom on his own land by driving piles in the dam, although he thereby excludes the mill-owner from making it a depository of lumber for his mills.[7] The owner is entitled to ice formed above his land; to the use of water for his cattle, for irrigation, or any reasonable purpose not interfering with the

[1] Palmer Co. *v.* Ferrill, 17 Pick. 58.

[2] Gilliam *v.* Canaday, 11 Ired. 106.

[3] Paine *v.* Woods, 108 Mass. 160; Kimel *v.* Kimel, 4 Jones L. 121; Avery *v.* Van Deusen, 5 Pick. 182.

[4] Palmer Co. *v.* Ferrill, 17 Pick. 58.

[5] Palmer Co. *v.* Ferrill, 17 Pick. 58.

[6] Marcy *v.* Fries, 18 Kan. 353.

[7] Jordan *v.* Woodward, 40 Me. 317.

use of the mill.[1] He cannot fill up the flats, and thus diminish the capacity of the basin. He can use his land, but not so as to interfere with the efficient use of the dam.[2] The fee to the land remains in the owner, subject only to the easement.[3]

§ 302. **Reservoir for dam — Outlets.** — In order to provide a sufficient supply of water for the dam, the owner may create a reservoir by erecting a dam or reservoir as a feeder. Such an erection is necessary to a dam, and is authorized by the statute.[4] Outlets cannot be made so as to discharge surplus water on the lands of others, without condemnation of the lands flowed.[5]

§ 303. **Height of mill-dam.** — The height of the dam is the common and convenient instrument wherewith to measure and describe the extent of a water-right, but such right may be defined and limited by any other appropriate monument on the ground. The actual interference by the water should measure the damages, and not such interference as was rendered possible by the height of the dam. A dam may be of any height, if there are appliances to keep the water down.[6] The owner of the mill erected has the right to have permanent record evidence of the height at which he may maintain his dam, specified in feet and inches, or otherwise permanently marked, and for this purpose may resort to a writ of *ad quod damnum*.[7] A permanent raising of a dam is a new taking, and requires a new assessment.[8] If the petition or order does not specify the height of the dam, the jury may specify it in their inquisi-

[1] Paine v. Woods, 108 Mass. 160.
[2] Boston Mill-Dam v. Newman, 12 Pick. 467.
[3] Hunter v. Matthews, 1 Rob. (Va.) 468.
[4] Wolcott Mfg. Co. v. Upham, 5 Pick. 292; Shaw v. Wells, 5 Cush. 587.
[5] Fiske v. Framingham Mfg. Co., 12 Pick. 68.
[6] Town v. Faulkner, 56 N. H. 255.
[7] Wright v. Pugh, 16 Ind. 106.
[8] Union Canal Co. v. Stump, Sup. Ct. Pa. —

tion.[1] In assessing damages on a petition to increase the height of a dam, the only damages to be considered are those occasioned by the increased height; not those occasioned by the former taking, but not foreseen in that assessment.[2] Where the plaintiff has accepted damages, he cannot complain of the unreasonable height of the dam.[3]

§ 304. **Mill must be built.** — The object of the mill act is for the encouragement of mills, by giving the right to flow lands. The right to flow is attached to a mill and the dam to raise water for working it, and the act does not embrace the case of a dam erected independently of a mill. The statute would form no defence to a man who should build a dam without a mill. The mill is the principal, and the dam the incident. Hence the mill-owner must show that the dam is connected with a water-mill, either actually existing or in process of construction; and if no mill is erected, the proceedings will be quashed on *certiorari*.[4] Another mill may be erected so as to interfere with a dam which has no mill attached.[5] On the disuse and removal of a mill, the dam ceases to be under the protection of the statute, and the common-law remedy revives.[6] A temporary non-user would not operate as an abandonment; but an express declaration, by the mill-owner, of an intention to abandon, accompanied by a removal of a dam, and giving notice to the owners of land flowed of his intention so to do, is an abandonment, and the owner cannot rebuild and flow back on a new dam.[7] A dam below a mill, not used in running a mill, is not within the protection of the statute.[8]

[1] Mairs *v.* Gallahue, 9 Gratt. 94.
[2] Eppes *v.* Cralle, 1 Munf. 258.
[3] Aken *v.* Parfrey, 35 Wis. 249.
[4] Barnard *v.* Fitch, 7 Metc. 605; Fitch *v.* Stevens, 4 Metc. 426.
[5] Fitch *v.* Stevens, 4 Metc. 426.
[6] Baird *v.* Hunter, 12 Pick. 556.
[7] French *v.* Braintree Mfg. Co., 23 Pick. 216; Curtiss *v.* Smith, 35 Conn. 156.
[8] Bryan *v.* Burnett, 2 Jones L. 305.

§ 305. **All owners of mills to be joined — Owners of lands.** — In actions against owners of mills, all should be joined. The mill act renders the owners subject to an action, but the action is not of tort. At common law, an action could be brought against either of tort-feasors; but under the mill act, all should be joined.[1]

All owners of lands who may have been injuriously affected by the dam should be joined, whether their lands are above or below the dam.[2] The possession of land flowed is sufficient to maintain a petition under the mill act, as possession would support a common-law action on the case for flowing lands.[3] Any owner injuriously affected may object to the verdict of the jury, even in the absence of a statutory provision for the intervention of owners into the proceedings. The owner has a right to be heard on the amount of damages to his lands.[4]

§ 306. **Transfer of dam — Liability of vendee of dam.** — The owner of a dam at the time when the yearly damages for flowing become due is liable to pay the damages for the whole of that year.[5] The damages are a lien on the property. The claimant for damages is not compelled to follow the several owners. He looks to the party in possession. A mortgagee in possession must be regarded as an owner for this purpose.[6] The former owner is also liable for damages accruing during his ownership.[7] The sale of a mill does not abate the proceedings for the assessment of damages. They may be carried on in the name of the successors.[8] In case of joint owners, buying at different times,

[1] Hill *v.* Baker, 28 Me. 19.
[2] Honenstine *v.* Vaughan, 7 Blackf. 520.
[3] Pace *v.* Freeman, 10 Ired. 103.
[4] Groce *v.* Zumwalt, 4 Mo. 567.
[5] Bryant *v.* Glidden, 36 Me. 36.
[6] Lowell *v.* Shaw, 15 Me. 242; Abbott *v.* Upham, 13 Metc. 172; Fuller *v.* French, 10 Metc. 359.
[7] Bean *v.* Hinman, 33 Me. 480; Charles *v.* Monson Mfg. Co., 17 Pick. 70.
[8] Forney *v.* Ralls, 30 Iowa, 559.

the rule in Wisconsin is that they shall be liable from the date of the oldest title, not exceeding three years from the proceedings, and the person purchasing an interest in mill property may insist on indemnity from his grantor.[1] For increase in flowage, the rule is that the grantors should pay the damages up to the time of sale, and the grantee afterward.[2]

§ 307. **Transfer of land flowed — Claim for damages by vendor and vendee.** — The owner of the land at the time the damage by flowing is done is entitled to the damages, notwithstanding he subsequently conveys it,[3] or has his interest taken away by foreclosure[4] or legal proceedings, or has leased the land for a term of years.[5] Hence the proper party against whom to bring proceedings to condemn land would be the executor of the owner during whose life the damages accrued, and not the heirs.[6]

§ 308. **Regularity of proceedings — Waiver of errors.** — Long acquiescence in the building of a mill raises the presumption that the damages have been paid,[7] at least to such an extent as to cause the court to refuse an injunction or action to abate the dam, and that the court will leave the parties to their common-law remedy for damages.[8] The proceedings must show a reasonable conformity to the requirements of the statute. A failure to show in the record that commissioners were appointed, or that a petition was filed, or

[1] Sabine v. Johnson, 35 Wis. 185.

[2] Sabine v. Johnson, 35 Wis. 185; Mead v. Hein, 28 Wis. 533. And see Pick v. Rubicon Co., 27 Wis. 433.

[3] Walker v. Oxford Woollen Co., 10 Metc. 203; Ballard v. Ballard Vale Co., 5 Gray, 468.

[4] Vaugh v. Wetherell, 116 Mass. 138.

[5] Sampson v. Bradford, 6 Cush. 303.

[6] Howcott's Executor v. Coffield's Executor, 7 Ired. 24; Fellow v. Fulgham, 8 Murph. 254.

[7] Young v. Price, 2 Munf. 534.

[8] Cobb v. Smith, 16 Wis. 661.

that commissioners took the oath and filed their report in proper time, discloses errors so gross as to confer no rights on the mill-owner.[1] Appearance of parties waives defects in the form of the sheriff's warrant.[2]

§ 309. **Abandonment of proceedings.** — The mill-owner cannot abandon proceedings commenced by him and take a nonsuit after a report of the damages has been filed,[3] but may at any time before that time.[4] In case two parties desire to condemn the same site, and one commences proceedings, but neglects and delays the completion of them, the presumption would be that he had abandoned his right, and in favor of the one who continues the construction.[5]

§ 310. **Limitations on actions and on payment of damages.** — The commencement of proceedings dates from the service of process, and not from the negotiations to purchase.[6] The right to apply for damages accrues when the dam is complete and put in operation, and the limitation on the bringing of actions should begin to run from that time, although there may be damages afterward resulting which could not have been foreseen.[7] The damages must be known and determined by the projectors, and are not to be determined by any after use.[8] When the statute provides that damages shall be paid within a certain time or the mill owner will be precluded from the benefit of the act, this leaves the owner his common-law remedy as soon as the limitation is passed.[9]

[1] Akin *v.* Davis, 11 Kan. 580.
[2] Wilmarth *v.* Knight, 7 Gray, 294.
[3] Pollard *v.* Moore, 51 N. H. 188.
[4] Hunting *v.* Curtis, 10 Iowa, 152.
[5] Macon *v.* Owen, 3 Ala. 116.
[6] Elting Woollen Co. *v.* Williams, 36 Conn. 310.
[7] Call *v.* Middlesex, 2 Gray, 232.
[8] Heard *v.* Middlesex Canal, 5 Metc. 81.
[9] Fowler *v.* Holbrook, 17 Pick. 188.

CHAPTER XXVI.

OF ABANDONMENT OF PROCEEDINGS AND DISCONTINUANCE OF PUBLIC IMPROVEMENTS.

§ 311. Proceedings may be abandoned.
312. Proceedings cannot be abandoned after report is confirmed.
313. Delay in determining whether or not proceedings shall be abandoned.
314. Discontinuance or abandonment as to a part.
315. Experimental assessments.
316. Right of owner to improve property pending proceedings.
317. Discontinuance of public improvements.
318. Discontinuance of roads and streets.
319. Where no entry has been made.
320. Evidence of abandonment — Non-user.
321. Relocation.

§ 311. **Proceedings may be abandoned.** — An assessment of damages does not operate as a payment, and, as possession cannot generally be taken before payment, it follows that the proceedings may be abandoned before consummation; and if the owner has never been disturbed in his possession, he cannot claim damages, nor can he force the sale on the condemning party.[1] Juries frequently award damages so exaggerated and enormous that the enterprise cannot profitably be carried out. Hence, on payment of costs,[2] proceedings may be discontinued, and the parties will be left in the same situation they were in before the

[1] Stacey v. Vermont Central R. R., 27 Vt. 39; Stiles v. Middlesex, 8 Vt. 486; Martin v. Mayor of Brooklyn, 1 Hill, 545; Graff v. Mayor of Baltimore, 10 Md. 544; The State v. Central R. R., 17 Ohio St. 103; Dayton R. R. v. Marshall, 11 Ohio St. 497.

[2] North Missouri R. R. v. Lackland, 25 Mo. 515; Matter of Anthony St., 20 Wend. 618; Burlington R. R. v. Sater, 1 Iowa, 421; Regina v. Commissioners of Rochdale Improvement Act, 2 Jur. N. S. (Q. B.) 861; Leisse v. St. Louis & Iron Mountain R. R., 2 Mo. App. 105.

commencement of the proceedings.[1] The costs will embrace all the costs of the case, and counsel-fees.[2] The owners of land have no vested right in the verdict of the jury.[3] A simple vote of a corporation to take land is not in itself a taking, so as to justify the owner in proceeding to collect the damages for a taking, as if the taking had already been completed.[4] The officers of a city cannot make a contract by which they shall deprive themselves of the exercise of discretion in discontinuing a street. Such agreements would be contrary to public policy.[5] No preliminary step prior to actual payment, or tender, so fixes the liability of the city as to prevent an abandonment. The fact that benefits had already been collected would not change the matter. No individual can compel the corporation to persevere in an enterprise which, in the judgment of its legally constituted directors, would prove detrimental to the community.[6] A portion of a projected street may also be abandoned, and the proceedings continued as to the remainder.[7] Where, however, the proceedings are considered as transferring the title before actual payment, the owner has a vested right to the compensation, for the reason that the public have a vested right to the property;[8] and he also has that right where a road has been opened once, and is afterward abandoned. Until the last step is taken to cause the divesting of the title from the owner, the proceedings may be discontinued.[9] After the owner has a right to surrender

[1] The State v. Hug, 44 Mo. 116; Matter of Syracuse R. R., 11 N. Y. Sup. Ct. 311; Rensselaer R. R. v. Davis, 55 N. Y. 145; Rogers v. St. Charles, 3 Mo. App. 41.

[2] North Missouri R. R. v. Lackland, 25 Mo. 515.

[3] St. Joseph v. Hamilton, 43 Mo. 282; Baltimore R. R. v. Nesbit, 10 How. 395.

[4] Lancaster v. Kennebeck Co., 62 Me. 272.

[5] Martin v. Mayor of Brooklyn, 1 Hill, 545.

[6] The State v. Graves, 19 Md. 351; The State v. Keokuk, 9 Iowa, 488.

[7] Curtis v. Portland, 60 Me. 55.

[8] Wilkerson v. Buchanan County, 12 Mo. 328; Neal v. Pittsburgh R. R., 81 Pa. 19.

[9] Military Parade Ground, 60 N. Y. 319.

his property for compensation, the city cannot discontinue, and the mayor of the city may be compelled, by *mandamus*, to perform such a ministerial act as the filing of the description of the property with the registry of deeds, so as to complete the remedy of the owner.[1]

§ 312. **Proceedings cannot be abandoned after report is confirmed.** — After a report of damages has been acted on or confirmed, the party commencing the proceedings for his own benefit cannot, because dissatisfied with the amount awarded, abandon the proceedings and become *non suit*,[2] although he may at any time before the report is confirmed.[3] It is the acceptance and confirmation of the report that fixes the rights of the parties.[4] Until confirmation, the court may recommit the inquiry. The report may be unsatisfactory in some particulars, and may be sent back for review, although satisfactory in most respects.[5] The report may show that the damages to be paid are so heavy that the improvement cannot be prudently entered upon, and in such case it is perfectly proper to discontinue the proceedings before the confirmation of the report.[6] In case any change

[1] Farnsworth *v.* Boston, 121 Mass. 173.

[2] Pollard *v.* Moore, 51 N. H. 188; Stafford *v.* Mayor of Albany, 7 Johns. 541; Lafayette *v.* Shultz, 44 Ind. 97; Hupert *v.* Anderson, 35 Iowa, 579; Gear *v.* Dubuque R. R., 20 Iowa, 523; Jones *v.* Oxford, 45 Me. 419.

[3] Washington Park, 56 N. Y. 145; Stevens *v.* Duck River Co., 1 Sneed. 237; Matter of Canal St., 11 Wend. 154; The People *v.* Brooklyn, 1 Wend. 318; Dover St., 18 Johns. 506; Hudson River R. R. *v.* Outwater, 3 Sandf. 689; Matter of Commissioners of Jersey City, 31 N. J. L. 72.

[4] Hawkins *v.* Rochester, 1 Wend. 53; Martin *v.* Mayor of Brooklyn, 1 Hill, 545; Matter of Rhinebeck R. R., 15 N. Y. Sup. Ct. 34; Graff *v.* Mayor of Baltimore, 10 Md. 544; City, Praying for Opening Streets, 20 La. An. 497; Rossignac St., 4 Rob. (La.) 357. On confirmation of report of appraisement, the option of the condemning party to abandon proceedings ceases. It is not necessary, in order to conclude the corporation, that the title to the land should have become vested in it under the proceedings. It is sufficient if the right to acquire it on payment of the award is fixed, and the duty of the corporation to pay the award is absolute. Matter of Rhinebeck R. R., 67 N. Y. 242.

[5] Matter of Anthony St., 20 Wend. 618.

[6] Matter of Canal St., 11 Wend. 154; The People *v.* Brooklyn, 1 Wend. 318;

occurs in the situation or condition of the property condemned, before accepting the report, there should be a new inquiry. If a bridge which had been condemned is destroyed before the acceptance of the report, the report should be recommitted. The public are not to pay for what does not exist. The title does not pass, or rights become vested, until the report is accepted.[1] An award may be confirmed by lapse of the time in which an appeal may be taken, and then the proceedings cannot be discontinued.[2] Although a deposit has been made by the condemning party, pending an appeal by the owner, the proceedings may be discontinued. The money deposited does not belong to the land-owner who refused to accept it and took his chances of appeal. By appealing, the question of the amount of compensation is still left open, and during that time the company can abandon.[3] When the title does not pass until compensation is paid, the proceedings may be formally discontinued after a judgment has been rendered that on payment of damages an entry may be made. There could be no disturbance of the owners until title passed, which could only be on payment of the compensation.[4] Hence, execution would not be allowed on such judgments.[5] In a recent case in Vermont,[6] the company had concluded the condemnation of the land of Brown, and deposited the compensation in bank; but, before the demand of the money by Brown, the railroad company was enjoined from constructing its road on the route leading across the lands of Brown, on a bill in chan-

Starr *v.* Rochester, 6 Wend. 564; Gear *v.* Dubuque R. R., 20 Iowa, 523; St. Louis R. R. *v.* Wilder, 17 Kan. 289.

[1] Farmer *v.* Hooksett, 28 N. H. 244.

[2] The People *v.* Syracuse, 20 How. Pr. 491.

[3] Blackshire *v.* Atchison R. R., 13 Kan. 514. *Contra*, Crowner *v.* Watertown R. R., 9 How. Pr. 457.

[4] Chicago *v.* Barbian, 80 Ill. 482. Especially where there has been error in stating the title of parties. Chesapeake R. R. *v.* Bradford, 6 W. Va. 220.

[5] St. Louis R. R. *v.* Teters, 68 Ill. 144; Bloomington *v.* Miller, 84 Ill. 621 (1877).

[6] First National Bank *v.* West River R. R., 49 Vt. 167.

cery brought by other parties, alleging that the railroad company had no right to construct its road over the route where it had located its line. There was a motion to dissolve the injunction; but the company did not contest the matter further, and abandoned the work on, and the location of, their road over the land of Brown. The court held that the abandonment of the road was a virtual confession and establishment of the fact that the railroad company had no right to locate and build its road over the lands of Brown, — not from an adjudication in the injunction proceedings, but as the result of the facts conceded to exist. If, then, the company had no right to condemn, it acquired no title to the land, and the owner had no right to the deposit. The entry on the land was a mere trespass, and for that alone could damages be allowed.

§ 313. **Delay in determining whether or not proceedings shall be abandoned.** — There should be no unreasonable delay in determining whether or not the proceedings shall be abandoned.[1] The owner may compel the condemning party to elect promptly whether or not they will abandon.[2] In case of delay, damages should be allowed for trouble and expense, as the owner cannot know whether his land is to be taken or not, and is disturbed in its use.[3]

[1] Baltimore R. R. *v.* Nesbit, 10 How. 395.

[2] The State *v.* Cincinnati R. R., 17 Ohio St. 103.

[3] Drury *v.* Boston, 101 Mass. 439; New Bedford *v.* Bristol, 9 Gray, 346; Gear *v.* Dubuque R. R., 20 Iowa, 523. In Whitney *v.* Lynn, 122 Mass. 338, the street was laid out, but no entry made within two years from the time when the right of action accrued. The court hold that, under a statute allowing "full indemnity for the trouble and expense" to which an owner has been put by the commencement and subsequent abandonment of proceedings, there cannot be an allowance for "vexation, disquietude, annoyance, or uncertainty," but only the trouble from which some material or pecuniary injury results, involving labor and the expenditure of time, or occasioning inconvenience to the owner in the use and occupation of the land; all of which may be estimated in damages by a standard common to all cases. But mental troubles, so difficult to estimate by any pecuniary standard, and which may vary in different individuals, according to their temperament or health, do not come within the meaning of the statute, and are not the subject-matter of damages.

There is a discretion in the court as to the fixing the terms on which the discontinuance shall be had.[1] During the time of delay, the owner is entitled to the rents and profits,[2] and the damages suffered.[3] Among the damages should be the expense in removing or building fences, or forbearance to cultivate land, when done on faith that the company would accept the route.[4] The rule would not cover a temporary depreciation in value of property pending the proceedings.[5] The owner cannot recover for labor, time, and expense in conducting proceedings on his part, nor his attorney's and witnesses' fees. There is no contract on the part of the company, and hence no breach, and the action of the company is not tortious.[6] The public must be held to a speedy and prompt termination of the proceedings. The fact of great delay, and abandonment, of the proceedings is *prima facie* evidence that they were unnecessary, and, until fully justified by proof, must subject the corporation to the necessity of indemnifying the owner for injury resulting from such delay.[7] Should the delay continue as long as four years, or to an unreasonable time, there should be a new valuation to cover enhanced value. The value is estimated as for immediate payment, and the condemning party cannot wait until the property has increased in value, and then claim the right to proceed and pay the first valuation. The court cannot permit delays in proceedings, any more than delays in payment of compensation.[8] The owner, in case of delay, may move the court

[1] Washington Park, 56 N. Y. 145.

[2] Hamersley *v.* New York, 56 N. Y. 533; Detmold *v.* Drake, 46 N. Y. 318; McLaughlin *v.* Municipality, 5 La. An. 504.

[3] Stevens *v.* Duck River Co., 1 Sneed, 237.

[4] Gear *v.* Dubuque R. R., 20 Iowa, 523.

[5] Mallard *v.* Lafayette, 5 La. An. 112.

[6] Bergman *v.* St. Paul R. R., 21 Minn. 533.

[7] McLaughlin *v.* Municipality, 5 La. An. 504. Here the proceedings were delayed eighteen months, and were twice abandoned, and the owner was deprived of rents of buildings in process of erection, which he suspended to await the termination of the proceedings.

[8] Bensley *v.* Mountain Water Co., 13 Cal. 306; Warren *v.* St. Paul R. R., 18 Minn. 384.

on the subject,[1] and have the order for confirmation entered.[2] If a corporation delay until the judgment is entered, they lose their election to abandon.[3] While proceedings are pending, the city council may suspend the proceedings temporarily, so that the presentation of the report would be irregular;[4] but an unreasonable delay would justify a confirmation of the report, or a new inquiry of damages. An abandonment of proceedings restores to the owner all his interest in the lots sought to be condemned. A separate action may be instituted for damages suffered which are the direct and proximate result of the condemnation proceedings, and the acts of the city under them.[5]

§ 314. **Discontinuance or abandonment as to a part.**— Although a certain portion of land is described in a petition as necessary for the construction of the improvement, a a certain portion may be left out if not needed. The condemning party is not estopped by the allegation in the petition as to the quantity of land to be taken, when its engineer is of opinion that a less quantity would be sufficient.[6] Again, the power of condemnation extends only to property necessary for the public use, and if a less quantity will suffice, the condemnation of more will not be justified.

§ 315. **Experimental assessments.**— A corporation authorized to condemn land may make experimental surveys, but cannot institute experimental suits at law to determine amounts of damages by various routes. When a location is made, either party may institute proceedings to assess damages, and the company cannot withdraw.[7] The state may go so far as to assess damages and order the road to

[1] Hudson River R. R. *v.* Outwater, 3 Sandf. 689.
[2] Matter of Rhinebeck R. R., 15 N. Y. Sup. Ct. 34.
[3] Duncan *v.* Louisville, 8 Bush, 98.
[4] Common Council of Brooklyn, 12 N. Y. Sup. Ct. 175.
[5] Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.
[6] Peoria R. R. *v.* Bryant, 57 Ill. 473.
[7] Neal *v.* Pittsburg R. R., 2 Grant Cas. 137.

be opened, without paying damages, but before the road is actually opened the damages should be paid.[1] In the case of Rogers *v.* St. Charles,[2] the court severely condemns the practice of municipalities in having recourse tentatively to a number of juries, and in rejecting such findings as are not thought reasonable, and fastening upon and holding the citizen to the first one which places an estimate on the value of the property sufficiently low. The court further say: "We cannot perceive what possible advantage can arise from the constitutional declaration that private property shall not be taken for public use without just compensation, if the state, or any of its deputies, exercising the right of eminent domain, may cause as many inquests as it pleases of the value of the property to be condemned, and set aside as many of them as it sees fit, until one is found sufficiently small to suit its notions of a just compensation, and to declare it to be so. Of course, this permits one of the parties to a controversy to determine a judicial question in his own favor, and compels the other party to submit to the decision." Proceedings may be abandoned, but "in such cases, however, the party exercising, by delegation, the tremendous power known as the right of eminent domain must act in good faith. The exercise of this right can only be justified on the ground of the necessity of the particular property for the public use. To allow the state, or any deputy of the state, to pronounce a particular piece of property necessary or unnecessary, according to the terms on which it may be possible to acquire it; to enable the state, or any corporation, to be the sole judge of the due correspondence between the property and its variously estimated value; to cause a thousand estimates to be made, and to have the unrestricted right of rejecting, *toties quoties*, every estimate which did not suit its views, would be thought an extravagant idea of arbitrary power if it were imagined in

[1] Parham *v.* Justices, 9 Ga. 341.
[2] 8 Mo. App. 41.

a satire. But if the purpose, instead of being abandoned in good faith, is merely modified so as to make the party exercising the right of eminent domain to take the chances of a verdict of another jury, the first proceedings are a flat bar to such a course, and this for the sufficient reason that any other rule would work monstrous oppression and spoliation. We do not mean to say that there may not be, on the part of municipal or other corporations, an abandonment of a particular project in a given year, let us say in the year 1870, and in the year 1874 a revival of the same measure. What we do mean to say is, that such a corporation shall not, under the color of this power, set at naught the constitutional provision that just compensation shall be made for all private property taken for public use."

§ 316. **Right of owner to improve property pending proceedings.**[1] — Owners have a right to improve their own property, notwithstanding a line of public improvements has been marked out, unless such improvements were made in gross bad faith.[2] In case of improvements made, the company must pay for the enhanced value,[3] and the same rule would cover enhancement in value arising from other causes, during the time of delay.[4]

§ 317. **Discontinuance of public improvements.**—There is no contract with surrounding property-owners that a public improvement shall always exist as at present; and no damages will be allowed for its discontinuance, notwithstanding improvements may have been made on the supposition that they will remain, and notwithstanding property

[1] See also *ante*, § 148.

[2] Sherwood *v.* St. Paul R. R., 21 Minn. 122.

[3] St. Paul R. R. *v.* Murphy, 19 Minn. 500; Winona R. R. *v.* Denman, 10 Minn. 267; Hursh *v.* St. Paul R. R., 17 Minn. 439.

[4] Warren *v.* St. Paul R. R., 18 Minn. 384.

has been thereby enhanced in value.[1] If the property is used for a certain public purpose, — as, for drainage, — for which monthly damages are paid, the damages would cease as soon as the public use ceased, and the owner could not claim as on a contract to continue to use.[2] On the discontinuance of a railroad, the fee reverts to the owner, and the railroad cannot recover back the amount paid for right of way; nor reoccupy, after abandonment, without further proceedings. It would be unjust to give the owner back the land, subject to a right in the railroad to reënter.[3] There can be no claim of damages resulting from the deprivation of the use of a plank-road which has been condemned for the use of a railroad. That inconvenience is common to the entire community, and similar in character to that arising from an abandonment of the road, for which no damages could be claimed. The owner should be allowed damages for the expense of a private way from his premises to the public highway, rendered necessary by the occupation of the plank-road by a railroad company. The use of the land by the railroad would not admit of a use as a road by the adjoining owner.[4]

§ 318. **Discontinuance of roads and streets.** — Damages for discontinuance of a highway may be allowed to one whose only communication was by a private way into the road thus discontinued,[5] or whose only means of ingress and egress was by such highway.[6] No damages will be allowed for the discontinuance of a highway which was not legally laid out,[7] or had not been opened,[8] or had not been

[1] Brooklyn Park *v.* Armstrong, 45 N. Y. 234; Stuber's Road, 28 Pa. 199; Mayor *v.* Hopkins, 13 La. 326.

[2] The State *v.* Administrator of Public Accounts, 26 La. An. 336.

[3] Hastings *v.* B. & M. R. R., 38 Iowa, 316.

[4] Brainard *v.* Missisquoi R. R., 48 Vt. 107.

[5] Petition of Concord, 50 N. H. 530.

[6] Butterworth *v.* Bartlett, 50 Ind. 537.

[7] Perry *v.* Sherborn, 11 Cush. 388.

[8] The People *v.* Griswold, 2 N. Y. Sup. Ct. 351; The People *v.* Commis-

used for twenty years.[1] No damages will be allowed to an owner of land not abutting on the way discontinued, whose land is accessible by other ways,[2] and to whom the way discontinued was simply convenient, and although the discontinuance injuriously affected the value of the property.[3] The same rule would also apply to the discontinuance of a bridge.[4] The land-owner cannot recover for the vacation of a portion of the road not adjoining his lands. The vacation is a matter of public policy. There is a distinction between the right to use an existing highway and a right to its continuance. The latter is entirely under the public control.[5] If the owner has advanced money to secure the construction of the road, the road cannot be abandoned without refunding the money.[6] One desiring to enjoin the vacation of a street must establish the fact that he has rights which will be abridged by such vacation.[7]

§ 319. **When no entry has been made.**—The ancient rule was, that when a street had been laid out the damages were due, although no entry had been made for the purpose of construction.[8] The rights of the parties were considered

sioners of Highways, 1 N. Y. Sup. Ct. 198. The first case was, on appeal, affirmed, the court holding that the discontinuing of old roads applies to such roads as have been opened and used, and not to such as have been newly laid out and are not yet opened. Old roads are to be discontinued when they have "become useless and unnecessary." The finding of the jury as to the necessity at the time of laying out the road is conclusive, and cannot be defeated by the discontinuing of the highway before it is opened. The People *v.* Griswold, 67 N. Y. 59.

[1] Eames *v.* Northumberland, 44 N. H. 67.

[2] Castle *v.* Berkshire, 11 Gray, 26; Smith *v.* Boston, 7 Cush. 254; Fearing *v.* Irwin, 55 N. Y. 486; Coster *v.* Albany, 43 N. Y. 399; The State *v.* Snedeker, 30 N. J. L. 80.

[3] The People *v.* Board of Supervisors, 20 Mich. 95; Jackson *v.* Jackson, 16 Ohio St. 163; Barr *v.* Oskaloosa, 45 Iowa, 275.

[4] Coster *v.* Albany, 43 N. Y. 399.

[5] Brady *v.* Shinkle, 40 Iowa, 576; Polack *v.* Trustees, 48 Cal. 490.

[6] Brown *v.* Bridges, 36 Iowa, 279.

[7] Sawyer *v.* Meyer, 45 Iowa, 152.

[8] Shaw *v.* Charlestown, 3 Allen, 588.

as fixed by the laying-out, although the highway was forthwith discontinued, or was never, in fact, opened.[1] The easement taken was presumed to be perpetual, and the chance that it would be discontinued very remote, and hence *mandamus* would be sustained to compel the payment of the money.[2] This gave the owner damages although not disturbed; and further, gave him the land after the discontinuance.[3] To remedy this hardship on the public, statutes were passed restricting the damages in such cases to those actually suffered, and that no damage should be paid unless the land was actually taken. The owner could appeal from the award, and have an assessment by jury, although his land had not been taken. Under the statute, the award is a judgment on which execution is stayed until the land is actually taken.[4] A location of a railroad may be abandoned, and a deed tendered to the owner, but this will not bar the recovery of all damages, but the fact may go in mitigation of damages.[5]

§ 320. **Evidence of abandonment — Non-user.** — That a track, once used as a main track for a railroad, has been superseded by another track, leaving the old track to be used as a switch, does not operate as an abandonment of the old track, and it cannot be taken up against the will of the company.[6] The fact of abandonment may be shown, to defeat the recovery of damages over and above the amount paid, where the owner has applied to increase damages.[7] The grantee of a right of way does not lose his

[1] Hallock *v.* Franklin, 2 Metc. 558; Clough *v.* Unity, 18 N. H. 75; Shaw *v.* Charlestown, 3 Allen, 538; Willey *v.* Epping, 16 N. H. 58; Kent *v.* Wallingford, 42 Vt. 651; Battles *v.* Braintree, 14 Vt. 348.

[2] Harrington *v.* Berkshire, 22 Pick. 263; Kirtland *v.* Meriden, 39 Conn. 107.

[3] Clark *v.* Hampstead, 19 N. H. 365.

[4] Harding *v.* Medway, 10 Metc. 465; Lacroix *v.* Medway, 12 Metc. 123; Clark *v.* Hampstead, 19 N. H. 365.

[5] Pinkerton *v.* Boston R. R., 109 Mass. 527.

[6] Columbus *v.* Columbus R. R., 37 Ind. 294.

[7] Hastings *v.* B. & M. R. R., 38 Iowa, 316.

right by *non-user*. The grant is as of an easement by deed, which is not lost by *non-user*.[1] If the railroad company abuses its franchise, and does not keep the railroad in operation, the legislature may interfere, or the corporation be controlled in a direct proceeding,[2] but not at the suit of the owner of the land taken.[3]

§ 321. **Relocation.** — Actual damages only are to be paid on a relocation, — that is, the excess of damages suffered in consequence of the new road over that of the old road. If the damages fall below that, no judgment could be given for damages.[4]

[1] Washb. on Ease. 640; Barlow *v.* Chicago R. R., 29 Iowa, 276; Noll *v.* Dubuque R. R., 32 Iowa, 66.

[2] Noll *v.* Dubuque R. R., 32 Iowa, 66.

[3] Hamilton *v.* Annapolis R. R., 1 Md. Ch. 107.

[4] Jewett *v.* Israel, 35 Iowa, 261.

CHAPTER XXVII.

OF PROCEEDINGS SUBSEQUENT TO THE ASSESSMENT OF DAMAGES — APPEALS AND REVISION OF PROCEEDINGS.

§ 322. Right to appeal.
323. Errors to be taken advantage of by appeal.
324. Waiver of irregularities in proceedings.
325. Waiver of right of trial by jury.
326. Errors waived by condemning party.
327. Timely objection to irregularities.
328. Claim of damages.
329. Receipt of damages.
330. Failure to find damages — A judgment.
331. *Mandamus* to compel finding.
332. Subsequent proceedings do not cure former defects.
333. *Certiorari*.
334. Deed to condemning party — Obtaining possession.

§ 322. **Right to appeal.** — In ordinary cases either party may appeal. That is a proper method of ascertaining what is the just compensation.[1] The action of the inferior tribunals may be made final and conclusive, so that no appeal will be permitted.[2] The action of the court in the appointment of viewers,[3] the report of the commissioners as to the expediency and necessity of roads and improvements,[4] or on

[1] Lee *v.* North-Western R. R., 33 Wis. 222.

[2] In Maryland, the legislation relating to eminent domain allows no appeals. West Maryland R. R. *v.* Patterson, 37 Md. 125; Wilmington R. R. *v.* Condon, 8 Gill & J. 443. In Texas, the proceedings may be final, being considered as in the nature of a proceeding *in rem*. Smith *v.* Taylor, 34 Texas, 589. Doubted in North Missouri R. R. *v.* Lackland, 25 Mo. 515.

[3] Hannibal R. R. *v.* Morton, 20 Mo. 70.

[4] McCrory *v.* Griswold, 7 Iowa, 248; Wilmington Canal Co. *v.* Dominguez, 50 Cal. 505; Commissioners' Court *v.* Bowie, 34 Ala. 461; Hill *v.* Bridges, 6 Port. 197; Shattuck *v.* Waterville, 27 Vt. 600; West River Bridge *v.* Dix, 16 Vt. 446; Harwinton *v.* Catlin, 19 Conn. 520; *In re* Fowler, 53 N. Y. 60; The People *v.* Collins, 19 Wend. 56; The People *v.* Van Alstyne, 32 Barb. 181; The State *v.* Justice, 24 N. J. L. 413; Hanson *v.* Lafayette, 18 La. 295.

the amount of damages,[1] or as to whether a sufficient mill-yard is left, where the statute exempts mills, and part of a mill-yard is taken,[2] may all be made final. The remedy is statutory, and the result may be made final, so that there is no appeal.[3] The mere silence of the act on the subject of appeals, or failure to provide for appeals, will not exclude an appeal as in ordinary cases.[4] The legislative provision prohibiting appeals would not preclude a resort to other methods for the correction of the finding where irregularity, mistake, or fraud have interfered.[5] The remedy for an abuse of discretion, where no appeal is allowed, is by *certiorari* or writ of error.[6] In case the owner appeals, he should not be compelled to give bond.[7]

§ 323. **Errors to be taken advantage of by appeal.** — The validity of a condemnation, or the question whether or not the land was necessary, cannot be called in question in a collateral proceeding. Errors complained of should be corrected by appeal[8] or *certiorari*,[9] and not in equity.[10] Otherwise, a corporation would have no assurance that the steps taken would conclude any one, and they would be

[1] New Britain v. Sargent, 42 Conn. 137.

[2] The People v. Kingman, 24 N. Y. 559.

[3] Western R. R. v. Dickson, 30 Wis. 389; Kramer v. Cleveland R. R., 5 Ohio St. 140.

[4] Bridge v. New Hampton, 47 N. H. 151.

[5] Garrison v. New York, 21 Wall. 196; Harwinton v. Catlin, 19 Conn. 520.

[6] The People v. Collins, 19 Wend. 56; Palmer Co. v. Ferrill, 17 Pick. 58.

[7] Nebraska R. R. v. Van Deusen (Sup. Ct. Neb.), 5 Cent. L. J. 430. See also § 136.

[8] Hamilton v. Annapolis R. R., 1 Md. Ch. 107; Evans v. Haefner, 29 Mo. 141; Clement v. Burns, 43 N. H. 609; The State v. Richmond, 26 N. H. 232; Crise v. Auditor, 17 Ark. 572; Ney v. Swinney, 36 Ind. 454; Galena R. R. v. Pound, 22 Ill. 399. In a collateral proceeding, — as, an indictment for obstructing a highway, — the presumption is in favor of the validity of the establishment of the road; that the viewers had taken the proper oath; that notices had been properly given; that the petitioners were legal voters, and that jurisdiction had been acquired. Henline v. The People, 81 Ill. 269.

[9] Van Steenbergh v. Bigelow, 3 Wend. 42.

[10] Northern Central Coal Co. v. Coal and Iron Co., 37 Md. 537. Invalid proceedings are not a cloud upon title, to be remedied in equity. Ewing v. St. Louis, 5 Wall. 413.

constantly subject to vexatious litigation.[1] Errors in adjudication which are merely voidable, and do not render the adjudication void, cannot be availed of by the public after action has been taken. The only remedy is by appealing from the adjudication.[2] In an action by a tenant for life for the sum awarded as damages to her, the town cannot show that there was error in awarding the entire sum to the tenant for life, instead of to the tenant and reversioner jointly. Such an error should have been remedied by an appeal from the award.[3] It cannot be shown in a collateral action for damages that commissioners, in their original report, had been misled by misrepresentations of the railroad company as to the manner in which the road would be built.[4] The question of the adequacy of damages is to be remedied by appeal, and not by *certiorari*.[5] An injunction is not a proper method of correcting errors in proceedings. An injunction is in that case a collateral proceeding. By appealing from an appraisement, the only question left is the adequacy of the damages.[6] A direct action to set aside an award will not be sustained where an appeal is allowed, and it is not alleged that an appeal was prevented by fraud, collusion, accident, or mistake.[7] Where the irregularity of the proceedings is the ground of objection, the claimants will not be permitted to resort to the remedy of injunction, but will be confined to an appeal; or, if the proceedings are so erroneous as to be reversible, to a petition in error; unless, indeed, special circumstances of fraud, accident, mistake, or the like, are shown.[8]

§ 324. **Waiver of irregularities in proceedings.** — The owner may waive irregularities in the statutory proceedings,

[1] Secombe *v.* Railroad Co., 23 Wall. 108.
[2] True *v.* Freeman, 64 Me. 573.
[3] Sparhawk *v.* Walpole, 20 N. H. 317.
[4] Butman *v.* Vermont Central R. R., 27 Vt. 500.
[5] The State *v.* Hulick, 33 N. J. L. 307; Johnston *v.* Rankin, 70 N. C. 550.
[6] Ney *v.* Swinney, 36 Ind. 454.
[7] The People *v.* Wasson, 64 N. Y. 167.
[8] Frevert *v.* Frifrock, 31 Ohio St. 621; McClelland *v.* Miller, 28 Ohio St. 488.

and thus lose his right to resort to his common-law remedies of trespass and ejectment. If he makes his only contest upon the question of damages, and obtains an increase of damages, he cannot afterward maintain an action for occupation.[1] An endeavor on the part of the owner to obtain an assessment on an increase of damages is a waiver of irregularities. The owner cannot claim damages for the taking, and at the same time say the land was not taken.[2] Exceptions to form of petition for a jury or to irregularities in summons cannot be taken after verdict,[3] especially if the party is present and does not specifically object.[4] The parties must preserve their objections, so that the record shall show them.[5] An objection that the commissioners did not report especially whether any yard, garden, orchard, or any part thereof, was taken by the establishment of the road, will be waived if timely exception is not taken.[6] Filing a remonstrance to a petition, without objecting to the insufficiency of the petition, waives objections as to its sufficiency.[7] An appeal cures the objection that no notice of the meeting of commissioners was given.[8]

§ 325. **Waiver of right of trial by jury.** — The right of trial by jury, whether considered as preserved in condemnation cases by the constitution or prescribed by statute, is of such a nature that it may be waived. As, for instance, in Massachusetts, the owner desiring a jury must apply for the issue of a jury-warrant; otherwise, he will be presumed to have abandoned his right to a jury.[9] A railroad company, asking for a change of venue, waives the right to a

[1] Jordan v. Haskell, 63 Me. 198.
[2] Pinkham v. Chelmsford, 109 Mass. 225.
[3] Thayer v. County Commissioners, 10 Cush. 151; Merrill v. Berkshire, 11 Pick. 269.
[4] The People v. Commissioners of Greenbush, 24 Wend. 367.
[5] Walker v. Boston R. R., 3 Cush. 1.
[6] Jeter v. Board, 27 Gratt. 910.
[7] Sowle v. Cosner, 56 Ind. 276.
[8] The State v. Fond du Lac, 42 Wis. 287.
[9] Thorndike v. Norfolk, 117 Mass. 566.

jury of view, for the reason that one court cannot send its jury into another county.[1]

§ 326. **Errors waived by condemning party.** — If a proceeding for condemnation has gone on and been consummated, the town, city, or party condemning cannot take advantage of such errors in the preliminary proceedings as failure to give notice, or to include names of all owners in the laying-out,[2] or any error which was known during the progress of the trial,[3] or that damages were excessive,[4] or that damages were assessed in an unconstitutional manner, when the corporation had accepted and acted on the legislation.[5] The corporation cannot object that the preliminary proceedings are informal and irregular, when the owner has appealed from the report of the commissioners, which report was, on application of the condemning party, confirmed.[6] The corporation cannot object that the structure was not made by competent authority, or that the proper preliminary proceedings had not been had, including the consent of the selectmen.[7] The rule would not apply to cases where towns are really adverse parties to the proceedings, as where a town may resist the laying-out of a highway as unnecessary. In such a case the town is not properly a condemning party, and may except to errors in the proceedings, and may also appeal.[8] Errors of power or jurisdiction cannot be waived by the condemning party.[9]

§ 327. **Timely objection to irregularities.** — The party affected must make timely objection to errors, or they will be deemed waived. The fact that the matter had been

[1] Rockford R. R. v. Coppinger, 66 Ill. 510.
[2] Haskell v. Bristol, 9 Gray, 341; Stafford v. Albany, 6 Johns
[3] Flagg v. Worcester, 8 Cush. 69.
[4] Betts v. New Hartford, 25 Conn. 180.
[5] The People v. Murray, 5 Hill, 468.
[6] St. Joseph R. R. v. Orr, 8 Kan. 419.
[7] Parker v. Boston R. R., 3 Cush. 107.
[8] Inhabitants of West Newbury v. Chase, 5 Gray, 421.
[9] Cuyler v. Rochester, 12 Wend. 165.

referred to arbitrators cannot be raised on appeal, after a regular proceeding has been had.[1] When parties introduce evidence on one theory of a case, they cannot afterward, on appeal, claim that their theory was erroneous. The time of objection should have been at the time of introducing the evidence, or of giving the instructions to the jury, so that the other party could have accommodated himself to the evidence produced and the issues presented.[2]

§ 328. **Claim of damages.** — The prosecution of a claim for damages, without exception to errors of form, will estop an owner from taking advantage of such defects, in case the allowance proves unsatisfactory to him.[3] The owner cannot prosecute a claim for damages, and at the same time contest the utility of the road.[4] If the proceedings are void, and the owner claims greater damages than have been awarded to him, such claim cannot be regarded as a waiver of irregularities, unless the party could, in those proceedings, have raised or taken the objection that the prior proceedings were void. A party cannot waive unless he has also an opportunity of insisting on his rights. Objecting to the sum offered as damages, and accepting the damages awarded, are acts widely different.[5] Filing a claim for damages does not waive errors constituting a failure to obtain jurisdiction.[6]

§ 329. **Receipt of damages.** — After receiving damages, parties cannot be heard against the validity of proceedings,[7] or appeal from the same,[8] although they may be in fact

[1] Field *v.* Vermont R. R., 4 Cush. 150.
[2] Kankakee R. R. *v.* Chester, 62 Ill. 235.
[3] Weaver's Road, 45 Pa. 405.
[4] Fisher *v.* Hobbs, 42 Ind. 276; Smith *v.* Alexander, 24 Ind. 454.
[5] Seifert *v.* Brooks, 34 Wis. 443.
[6] Johns *v.* Marion County, 4 Oreg. 46.
[7] Felch *v.* Gilman, 22 Vt. 38; Hitchcock *v.* Danbury R. R., 25 Conn. 516; Hawley *v.* Harrall, 19 Conn. 142; Embury *v.* Connor, 3 N. Y. 511; Town *v.* Blackbury, 29 Ill. 137; Karber *v.* Nellis, 22 Wis. 215; Kile *v.* Yellowhead, 80 Ill. 208.
[8] Mississippi R. R. *v.* Byington, 14 Iowa, 572.

erroneous.[1] A receipt of part of the damages, which part was the proper share of the proceeds from mortgaged premises, and acquiescence in the use, will operate as a waiver of irregularities. It does not signify that the damages were not paid directly to the claimant, but to his brother, the mortgagee, if the claimant actually received the money as his share of the damages.[2] The receipt of damages waives the question of the authority of the company to condemn outside of the limitations of the charter. Condemnation and receipt of damages operate as a conveyance. The individual cannot take the money, and reclaim the property because the company could not condemn or buy the land. The state may institute proceedings against the company for taking more land, or other land, than that allowed by the charter, but the individual who has received payment of damages cannot.[3] Where money awarded in a condemnation proceeding has been paid to a party having the apparent title, and another, claiming an interest in the land which has been condemned, exhibits his bill in chancery to set aside the title under which the former claimed, and asserting claim to a portion of the condemnation-money thus paid, this will be such an acquiescence in and ratification of the award as will render it conclusive in respect to the interest so claimed in the bill, and will waive questions of irregularities in filing reports, etc.[4]

§ 330. **Failure to find damages a judgment.** — In order to give a foundation for an appeal, a judgment must be rendered. If the commissioners make no adjudication whether or not damages have been sustained, such action is, in effect, an adjudication that no damages have been sustained, and the party objecting may appeal as from a judgment.[5]

[1] Rees *v.* Chicago, 38 Ill. 322.
[2] Whittlesey *v.* Hartford R. R., 23 Conn. 421.
[3] Burns *v.* Milwaukee R. R., 9 Wis. 450; Dodge *v.* Burns, 6 Wis. 514.
[4] Chicago R. R. *v.* Chamberlain, 84 Ill. 333.
[5] Howland *v.* Commissioners, 49 Me. 143; Monagle *v.* Bristol, 8 Cush. 360;

It is proper to report that no damages have been allowed, but no mention is equivalent to an adjudication that there are no damages.[1] It is proper to report the names of owners, and if they are unknown, to certify that fact,[2] but a failure to do so operates merely as a judgment of no damages. It should appear that each claimant's rights had been adjudicated upon, but the owner's name need not be mentioned, except that he was one of those to whom no damages were awarded.[3] In New Jersey, there must be a return of no damages, so that the owner can appeal; otherwise, the report will be set aside.[4] If the damages appear to be nominal or infinitesimally small, there may properly be a return of no damages.[5] Failure to find damages would not be a finding that the damages and benefits were equal, under a statute requiring a finding of the excess of either benefits or advantages, and that when the damages and benefits were equal, a finding of that fact.[6]

§ 331. **Mandamus to compel finding.** — The office of a *mandamus* is to require a tribunal of special, particular, or inferior jurisdiction to take cognizance of a case properly brought before it, and to decide upon it one way or the other,[7] not to revise the decision of such a tribunal on its merits. A refusal to give damages may be appealed from, and a *mandamus* will not lie to compel the tribunal to take

Cambridge *v.* County Commissioners of Middlesex, 117 Mass. 79; Goddard *v.* Worcester, 9 Gray, 88; Smith *v.* Boston, 1 Gray, 72; Point No-Point Road, 2 Serg. & R. 277.

[1] Hildreth *v.* Lowell, 11 Gray, 345; Inhabitants of North Reading *v.* County Commissioners, 7 Gray, 109; Granger *v.* Syracuse, 38 How. Pr. 308; *Re* Duke of Beaufort and Swansea Harbor Trustees, 29 L. J. (C. P.) 241.

[2] The Commonwealth *v.* Great Barrington, 6 Mass. 492.

[3] Granger *v.* Syracuse, 38 How. Pr. 308.

[4] The State *v.* Cooper, 23 N. J. L. 381; The State *v.* Everitt, 23 N. J. L. 378.

[5] Bradby *v.* Southampton Board of Health, 4 El. & Bl. 1014.

[6] Pettis *v.* Providence, 11 R. I. 372.

[7] The People *v.* Cortelyou, 36 Barb. 164; The People *v.* Lake County, 38 Cal. 487; Regina *v.* Sheriff of Middlesex, 5 Q. B. 365; 8 Q. B. 744.

further action.[1] If the tribunal has a further duty to perform, such as issuing a warrant to a jury, it may be compelled by *mandamus* to issue such warrant.[2] If the owner obtains a *mandamus* to compel a public officer to institute an inquiry of damages, the railroad company cannot be called on to pay the costs incurred in making the application.[3] In order to entitle the petitioner to a *mandamus*, it is desirable that a direct refusal, or something equivalent, should be shown.[4]

§ 332. **Subsequent proceedings do not cure former defects.** — An entry on land which is not condemned is a trespass, and this trespass is not cured by the fact that the entry was made under proceedings for condemnation supposed to have been perfect, and that subsequent valid proceedings have been instituted and perfected. There is no reason for holding that the condemnation would relate back to the inception of the invalid proceedings.[5] Relation is allowed to prevent injustice where a previous right existed, but no right to enter can exist until damages are paid. Although the former proceedings were defective, and were enjoined, yet that would not prevent subsequent valid proceedings.[6]

§ 333. **Certiorari.** — The office of a *certiorari* is to bring up proceedings of a lower court, generally one of inferior jurisdiction, such as commissioners' courts, boards of aldermen,[7] etc., that they may be either affirmed or quashed, and

[1] Smith *v.* Boston, 1 Gray, 72; Goddard *v.* Worcester, 9 Gray, 88.

[2] Carpenter *v.* Bristol, 4 Pick. 258; Smith *v.* Boston, 1 Gray, 72.

[3] Regina *v.* Sheriff of Middlesex, 5 Q. B. 365.

[4] Regina *v.* Wilts & Berks Canal, 8 Dowl. 623.

[5] Powers *v.* Hurmert, 51 Mo. 136; Hooper *v.* Bridgewater, 102 Mass. 512. See also *ante*, § 90.

[6] Peck *v.* Van Rensselaer, 8 Blackf. 312.

[7] Brimmer *v.* Boston, 102 Mass. 19; Parks *v.* Boston, 8 Pick. 218. In laying out a street, a city council is considered as acting in a judicial capacity.

not to enforce any right,[1] or to correct errors of fact,[2] or to try title.[3] The original record must be brought up, and the *certiorari* is directed to the officer having custody of the record.[4] Irregularities in proceedings of commissioners are to be remedied by *certiorari*, and not by application for a jury, or by taking an appeal. Either of those courses admits the regularity of the proceedings.[5] The appellate court is to decide whether the inferior tribunal had jurisdiction to perform the act, and whether in the performance it has kept within the powers given it by law,[6] and for this purpose they examine into the facts constituting jurisdiction.[7] Substantial irregularity in proceedings makes a *primâ facie* case of legal injury, and actual injury need not be shown.[8] If the remedy by appeal is not adequate, there may be issued a writ of *certiorari*.[9] The principles on which the commissioners acted may be reviewed on *certiorari*.[10] The sufficiency of the damages is not to be inquired into.[11] This remedy will not be granted because the record does not show notice was given to parties,[12] or

[1] Petition of Tucker, 27 N. H. 405; The People *v.* Lawrence, 54 Barb. 589; Bennett *v.* Camden R. R., 14 N. J. L. 145.

[2] Paine *v.* Leicester, 22 Vt. 44; Kingman *v.* Plymouth, 6 Cush. 306; The People *v.* First Judge, 2 Hill, 398; The State *v.* Green, 18 N. J. L. 179.

[3] Church *v.* Northern Central R. R., 46 Pa. 339.

[4] Morris Canal Co. *v.* The State, 14 N. J. L. 411. On *certiorari* the court can only take notice of the facts stated in the commissioners' return. The affidavits on which the writ is granted form no part of the return, and facts stated in the affidavits, or appearing outside, cannot be considered on the hearing. The allegations of service of notices are conclusive. The People *v.* Burton, 65 N. Y. 452.

[5] Fitchburg R. R. *v.* Boston R. R., 3 Cush. 58; Delaware R. R. *v.* Burson, 61 Pa. 369; Johnston *v.* Rankin, 70 N. C. 550; Ney *v.* Swinney, 36 Ind. 454.

[6] The People *v.* Canal Board, 7 Lans. 220; *In re* Edmondson, 17 Q. B. 67.

[7] The People *v.* Town of Seward, 27 Barb. 94. For this purpose affidavits are admissible. *In re* Penny, 7 El. & Bl. 660.

[8] *Ex parte* Keenan, 21 Ala. 558.

[9] Kroop *v.* Forman, 31 Mich. 144.

[10] New Jersey R. R. *v.* Suydam, 17 N. J. L. 25.

[11] McCrory *v.* Griswold, 7 Iowa, 248; Regina *v.* Board of Health of Halifax, 14 L. T. (N. S.) 447.

[12] Petition of Tucker, 27 N. H. 405. *Contra*, Barnett *v.* The State, 15 Ala. 829.

because there were defects in the notices,[1] or because the commissioners erred in taxing costs,[2] or because all the owners were not named, — those only being named who claimed damages, — or because out of a committee of three only two acted, or because the damages sustained by certain individuals were paid by those having a deep personal interest in the establishment of the road,[3] or because the damages assessed have not been paid.[4] *Certiorari* is granted in the discretion of the court, and not for every slight informality or irregularity.[5] A delay of three terms in making application for a *certiorari* will cause the application to be refused.[6] The extent of the delay necessary to cause the court to dismiss is in the discretion of the court.[7] Ordinarily, a *certiorari* stands or falls by the record as returned, and no parol evidence is admissible except as to want of jurisdiction, and corruption, of the inferior tribunal.[8] Errors which may be taken advantage of by appeal cannot be taken up by *certiorari*.[9] Although there may be lack of jurisdiction in only one part of the proceedings, yet a *certiorari* may issue to remove the whole proceedings.[10] The English act provides that proceedings shall not be removed by *certiorari*, but this cannot apply to cases where it is shown that jurisdiction has not attached. In such cases the proceedings are not properly under the act.[11]

[1] Cambridge *v.* County Commissioners of Middlesex, 117 Mass. 79. But see The State *v.* Smith, 21 N. J. L. 91.

[2] New Haven Co. *v.* Northampton, 102 Mass. 116.

[3] Inhabitants of Vassalborough, 19 Me. 338.

[4] Petition of Tucker, 27 N. H. 405.

[5] Lyman *v.* Burlington, 22 Vt. 131; Paine *v.* Leicester, 22 Vt. 44; The State *v.* Blauvelt, 34 N. J. L. 261.

[6] The State *v.* Woodruff, 36 N. J. L. 204; The State *v.* Ten Eyck, 18 N. J. L. 378.

[7] The State *v.* Green, 18 N. J. L. 179.

[8] Road Commissioners *v.* Fickinger, 51 Pa. 48.

[9] Boston R. R. *v.* Folsom, 46 N. H. 64; Petition of Tucker, 27 N. H. 405.

[10] South Wales Rail. Co. *v.* Richards, 6 Eng. Rail. Cas. 197.

[11] *In re* Edmondson, 17 Q. B. 67; Penny *v.* South-Eastern Rail. Co., 26 L. J. (Q. B.) 225; Regina *v.* Berkley, 1 Keny. 99.

§ 334. Deed to condemning party — Obtaining possession. — The title to the land condemned is vested by the proceedings, and no deed is necessary to justify entry,[1] unless specifically required by the act.[2]

If the owners interfere with the corporation after the land is condemned, their action is unlawful; but to put the company in possession, the company is not entitled to the process which usually follows a judgment in ejectment.[3] After the proper condemnation proceedings have been had, the officers and agents of the company may enter without being liable in trespass, or to criminal proceedings for taking possession of real estate by violence. The regularity of the condemnation proceedings constitutes a complete defence to a criminal prosecution, and it is not necessary for the company to enter suit in ejectment against the owners of the land. The pendency of exceptions to the report of commissioners does not affect the right of entry, but only the amount of compensation.[4] The English Lands Clauses Consolidation Act authorizes the issuance to the sheriff of a warrant to deliver possession, where the owner refuses to allow the entry; and if, in consequence of the owner's refusal, damage ensues, the company will be entitled to compensation.[5] The costs accruing by reason of the issuing and execution of such warrant are to be paid by the person refusing to give possession; and the amount of such costs are to be deducted from the compensation, if any, then payable; or, if no such compensation be payable, or if the same be less than the amount of such costs, then such costs, or the excess thereof beyond such compensation, if not paid on demand, shall be levied by distress.[6]

[1] Indianapolis R. R. *v.* Smythe, 45 Ind. 322.
[2] Evansville R. R. *v.* Miller, 30 Ind. 209.
[3] Niagara R. R. *v.* Hotchkiss, 16 Barb. 270.
[4] The State *v.* Dickson, 3 Mo. App. 464; 4 Cent. L. J. 478.
[5] Regent's Canal Co. *v.* Ware, 26 L. J. (Ch.) 566.
[6] 8 Vict., c. 18, § 91.

CHAPTER XXVIII.

OF COSTS OF PROCEEDINGS.

§ 335. Costs of condemnation.
336. What costs allowed.
337. Costs in discretion of trial court.
338. Costs to prevailing party.
339. Services of county commissioners.

§ 335. **Costs of condemnation.** — Costs of proceedings are recoverable with the compensation,[1] although in Pennsylvania it is held that no costs are recoverable unless the statute so provides.[2] In road cases, the matter is of public interest, and the county or municipality must pay the costs, and not the applicant or contestant.[3] It would seem to be a sufficient hardship to deprive an owner of his land by assessing the entire compensation in benefits. But the courts have gone so far, in some instances, as to compel the owner, out of his other property, to pay the costs of condemnation. In Rogers *v.* St. Charles,[4] the property condemned was land which was supposed to have been dedicated to public use by acts *in pais;* but the owner refused to relinquish the land to the city, and hence it was condemned, and the costs assessed against the owner, as the benefits equalled the damages. The owner then endeavored to escape the payment of costs by claiming that the land at all times belonged to the public. However, as his refusal to relinquish had caused the costs to be incurred, he was

[1] Chicago R. R. *v.* Bull, 20 Ill. 218.
[2] Herbein *v.* Railroad, 9 Watts, 272.
[3] Hawkins *v.* Robinson, 5 J. J. Marsh. 9.
[4] 54 Mo. 229.

held bound to pay the same. If a land-owner dies, having made an agreement of sale, or if the land descends to infants, the expense of procuring proper conveyances should be defrayed out of the purchase-money;[1] but where it is necessary to take out administration to perfect the legal title of a legatee under a will, the expense must be borne by the company.[2]

§ 336. **What costs allowed.** — Costs may be recovered for petition, entry, travel, and attendance before commissioners and before the appellate court; and for travel, attendance and witness fees before the jury, and for other matters usually taxable, and for costs of the Supreme Court. Term fees[3] and attorneys' fees are not allowed.[4] If the jury is a jury of view, costs of witnesses will not be allowed unless specially provided for.[5] The court will not award costs, on setting aside a verdict, to the party objecting to the verdict.[6] The English Land Clauses Consolidation Act allows "all reasonable costs, charges, and expenses incurred in summoning, impanelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry."[7] The company cannot recover of the owner any portion of their expenses for counsel, attorneys, or witnesses, but where the recovery is the same or less than the tender, the owner shall share what may be termed the formal costs,

[1] Midland Rail. Co. *v.* Wescomb, 2 Eng. Rail. Cas. 211; Eastern Counties Rail. Co. *v.* Tufnell, 8 Eng. Rail. Cas. 133; *In re* South Wales Rail. Co., 14 Beav. 418; *In re* Nash, 25 L. J. (Ch.) 20.

[2] *In re* Liverpool Improvement Act, 16 W. R. 667.

[3] Abbott *v.* Penobscot, 52 Me. 584.

[4] New Haven Co. *v.* Northampton, 102 Mass. 116; Marshall Fishing Co. *v.* Hadley Falls Co., 5 Cush. 602.

[5] Philadelphia *v.* Johnson, 2 Whart. 275.

[6] Connecticut River R. R. *v.* Clapp, 1 Cush. 559.

[7] 8 Vict., c. 18, § 52.

each party bearing his own costs over and above the formal costs.[1]

§ 337. **Costs in discretion of trial court.** — The allowance of all costs is largely in the discretion of the court allowing the same, and the appellate court will not grant a *mandamus* to compel the allowance of items rejected below.[2]

§ 338. **Costs to prevailing party.** — The general rule is to impose on the appellant the costs of a useless appeal, shown to be useless by a failure to obtain a modification in favor of the appellant.[3] The same rule applies to contests over the utility or necessity of laying out roads. The unsuccessful party must pay costs.[4] He must be considered the prevailing party who obtains a modification of the judgment in his favor. Hence, if the owner recovers no damages below, and is awarded damages above, he would be entitled to recover costs as the prevailing party.[5] In some cases, if the recovery has been diminished, the owner would be entitled to his costs if he still has a recovery allowed on his appeal.[6] The original costs in the court below should go against the party unsuccessful below and in favor of the party recovering damages, and the costs in the appellate court be allowed in favor of the successful party on appeal.[7]

[1] Bray *v.* South-Eastern Rail. Co., 19 L. J. (Q. B.) 11.

[2] Woodman *v.* Commissioners, 24 Me. 151.

[3] Kidder *v.* Oxford, 116 Mass. 165; Harvard R. R. *v.* Rand, 8 Cush. 218; Morse, petitioner, 18 Pick. 443; The People *v.* Van Alstyne, 3 Keyes, 35; Mettler *v.* Easton R. R., 37 N. J. L. 222; Schuylkill Co. *v.* Kittera, 2 Rawle, 488; White *v.* Coleman, 6 Gratt. 138; Eppes *v.* Cralle, 1 Munf. 258; Leak *v.* Selma R. R., 47 Ga. 345; Vicksburg R. R. *v.* Calderwood, 15 La. An. 481; Helm *v.* Short, 7 Bush, 623; The People *v.* McRoberts, 62 Ill. 38; Harrison *v.* Iowa R. R., 36 Iowa, 323.

[4] Senaker *v.* Justices, 4 Sneed, 116; Helm *v.* Short, 7 Bush, 623.

[5] Abbott *v.* Penobscot, 52 Me. 584; Pennsylvania R. R. *v.* Keiffer, 22 Pa. 356.

[6] Burrill *v.* Martin, 12 Me. 345; New Haven Co. *v.* Northampton, 102 Mass. 116.

[7] Schuylkill Co. *v.* Kittera, 2 Rawle, 488.

The English act requires the condemning party to offer a sum as compensation, and if the owner refuses the offer, and on compulsory arbitration it be determined that the same, or a less sum shall be allowed, then the costs fall on the claimant. If the company makes no offer, the owner, may recover his costs.[1] The offer made must be of money, and not encumbered by any conditions or reservations.[2] The costs of a *mandamus* to compel a railway company to summon a jury should fall on the claimant, in case the verdict shows a less sum than that previously offered by the company.[3] Where two appeals are taken by a remonstrant, one from the order of the board locating the highway, and the other from an order of the board approving the report of reviewers that remonstrant is entitled to no damages, they should be consolidated in one action; and if, on appeal, damages are allowed, but the highway is established, the remonstrant should pay costs of one appeal and the petitioners of the other.[4]

§ 339. **Services of county commissioners.** — If county commissioners are designated by the act as the parties to estimate damages in cases of condemnation by railroad companies, the companies cannot be compelled to pay them for their services, in the absence of an express statute.[5]

[1] Martin *v.* Leicester Water-Works Co., 27 L. J. (Exch.) 432; 8 Vict., c. 18, § 51.

[2] Balls *v.* Metropolitan Rail. Co., 35 L. J. (Q. B.) 101; Balls *v.* Metropolitan Board of Works, L. R. 1 Q. B. 337.

[3] Regina *v.* Waterford Rail. Co., 13 I. L. R. 272.

[4] Jamieson *v.* Commissioners of Cass County, 56 Ind. 466.

[5] Atlantic R. R. *v.* Cumberland Commissioners, 28 Me. 112.

CHAPTER XXIX.

OF LIMITATIONS TO ACTIONS AND PROCEEDINGS.

§ 340. Prompt adjustment necessary.
341. From what time the limitation should run.
342. Evidence of taking.
343. Limitation on pendency of proceedings.
344. Limitation on reports, appraisements, and appeals.
345. Excuses for failure to comply with statute.
346. Absence of special statute of limitations.

§ 340. **Prompt adjustment necessary.**—The legislature may properly limit the time in which actions shall be brought to have damages assessed, and unless the owner brings his action within a reasonable time, it would be presumed that he waived his damages on account of the benefit received by him from the public improvement.[1] It is presumed that these matters shall be inquired into and adjusted within a short and limited period, while the transaction is fresh and evidence easily obtainable, and while the public affairs are administered by the officers who are conversant with the transaction.[2] The legislature may fix a time in which a petition must be filed, and one year from the adjudication is not unreasonable.[3] In order to secure an accurate adjustment, it is proper to provide that no damages shall be allowed except as to those filing a written claim, and hence any other application would be considered as no application.[4]

[1] McLauchlin *v.* Charlotte R. R., 5 Rich. L. 583; Harper *v.* Richardson, 22 Cal. 251; Reckner *v.* Warner, 22 Ohio St. 275.

[2] Goddard *v.* Boston, 20 Pick. 407; Rexford *v.* Knight, 11 N. Y. 308; Callison *v.* Hedrick, 15 Gratt. 244; Potter *v.* Ames, 43 Cal. 75.

[3] Revere *v.* Boston, 14 Gray, 218; Erskine *v.* Boston, 14 Gray, 216; Flagg *v.* Worcester, 13 Gray, 601; Rexford *v.* Knight, 11 N. Y. 308.

[4] Reckner *v.* Warner, 22 Ohio St. 275.

§ 341. **From what time the limitation should run.** — The limitation should run only from the completion of the last work done; and work done on a sidewalk will extend the time limited for damages to be assessed on changing the grade of a street.[1] In Indiana, the limitation is from the time of the application. So, if the land is restored to its former condition by an accident, and is afterwards repaired so as to continue the damages complained of, the limitation will run from the first appropriation.[2] When the remedy of the owner is to commence at a certain time, and to expire by limitation dating from that time, that time must be taken as the time of taking. If that time is the vote of the mayor and aldermen, the vote perfects the taking. At least, the owner may so consider, and act accordingly.[3] The filing of a location or survey may be made conclusive as to the act of taking.[4] Hence, from that date should run the limitation in appealing or bringing further proceedings. Until the map is filed, the commissioners could not maintain trespass, as being in possession of the premises.[5] The time of taking may precede the filing of the survey, in which case the time may be fixed by parol.[6]

§ 342. **Evidence of taking.** — The actions of the sovereign, or of the municipal subdivisions of the state, in taking possession of land should be most strongly construed against them. Irregularities in their action will not avail as a defence, if possession has been taken. The owner is presumed to rely on the apparent intention of the public agents as shown by their actions. If land is ploughed and thrown up by the crew working under the control of the highway officers, and the selectmen are directed to settle the damages,

[1] Barker *v.* Taunton, 119 Mass. 392.
[2] Null *v.* Whitewater Canal Co., 4 Ind. 431.
[3] Loring *v.* Boston, 12 Gray, 209.
[4] Hazen *v.* Boston R. R., 2 Gray, 574; Davidson *v.* Boston R. R., 8 Cush. 91; Charlestown Branch R. R. *v.* Middlesex, 7 Metc. 78; Rider *v.* Striker, 63 N. Y. 136.
[5] Rider *v.* Striker, 63 N. Y. 136.
[6] Moore *v.* Boston, 8 Cush. 274.

the owner can rely on that action as a taking, although the selectmen testify that they did not intend to make the town liable, and designed only to repair an old bridle-road. Such repairs cannot materially change the character of the road without constituting a further taking.[1]

§ 343. **Limitation on pendency of proceedings.** — There may be a limitation on the pendency of proceedings, — as, that if the damages are not paid within a certain time, the proceedings shall be void. After the time designated has elapsed, there can be no proceedings to recover damages, by *mandamus* or otherwise.[2] The limitation on opening roads does not run as to the time spent in litigation concerning the same.[3] Where the statute provides that roads used for ten years should be considered public highways, the statute is essentially a statute of limitations, barring claims by owners of land for damages.[4]

§ 344. **Limitation on reports — Appraisements and appeals.** — It is proper to require reports of assessments to be filed within a certain time,[5] or hearings to be had,[6] and if the requirements are not observed, the proceedings may properly be considered as abandoned. Reports, however, may be continued from time to time.[7] The statute may authorize the title to pass on the completion of the appraisement,[8] which is then the date from which the limitation would run. Appeals must be made within the time limited by the statute,[9] and ten days' time from the date of the award is not unreasonable.[10]

[1] True *v.* Freeman, 64 Me. 573.
[2] The Commonwealth *v.* Commissioners of Philadelphia, 2 Whart. 286.
[3] Commissioners of Highways *v.* The People, 38 Ill. 347.
[4] Tomlinson *v.* Wallace, 16 Wis. 224.
[5] Teese, *ex parte*, 4 Pa. 69; Baldwin Road, 3 Grant, 62.
[6] Shinkle *v.* Magill, 58 Ill. 422; Commissioners *v.* Harper, 38 Ill. 103.
[7] Baldwin Road, 3 Grant, 62.
[8] Military Parade Ground, 60 N. Y. 319.
[9] Monagle *v.* Bristol, 8 Cush. 360.
[10] Harper *v.* Richardson, 22 Cal. 251.

§ 345. **Excuses for failure to comply with statute.** — In case of infants or persons under disability, the limitation is from the removal of disability.[1] Where sufficient excuse is given for not filing a claim within the statutory time, the claim may be considered if made before final action on the road.[2] Sickness of one's family, or missing of a train, are not sufficient excuses for failure to present claim of damages within the time prescribed. Such a failure to present a claim, or any failure, may properly be declared by the legislature to be a waiver of damages.[3]

§ 346. **Absence of special statute of limitations.** — In Pennsylvania, it is considered that, in the absence of a statute limiting the time in which actions for damages may be maintained, such actions can always be maintained against the company condemning.[4] In later cases, it is held that the company condemning can obtain a title by adverse possession for the statutory time for obtaining a title by adverse possession,[5] while possession for the statutory time in which petitions for damages might be maintained would not give a title by adverse possession to the company.[6] In Michigan, it is considered that the running of the regular statute of limitations presumes the consent of the owner, or a donation by him to the public use.[7] The unauthorized use of land as a road, under color of void condemnation proceedings, will not convey a title, or take away the right of the owner to enjoin such use, until the regular statutory time of limitations to real actions has run.[8]

[1] Indiana R. R. *v.* Oakes, 20 Ind. 9.

[2] Warner *v.* Doran, 30 Iowa, 521.

[3] Shearer *v.* Commissioners, 13 Kan. 145.

[4] Delaware R. R. *v.* Burson, 61 Pa. 369 (qualifying Forster *v.* Cumberland Valley R. R., 23 Pa. 371).

[5] Hannum *v.* Westchester, 68 Pa. 475.

[6] McClinton *v.* Pittsburgh R. R., 66 Pa. 404; Hannum *v.* Westchester, 68 Pa. 475.

[7] Bumpus *v.* Miller, 4 Mich. 159.

[8] Oliphant *v.* Commissioners of Atchison County, 18 Kan. 386. As to highways by limitation or adverse user, see article with that title in 7 Cent. L. J. 124.

CHAPTER XXX.

OF CONDEMNATION BY THE FEDERAL GOVERNMENT AND OF PUBLIC LANDS.

§ 347. Federal government has power to condemn.
348. Clause in Constitution of the United States.
349. Removal of condemnation proceedings to United States courts.
350. Condemnation of land belonging to the Federal government.
351. Condemnation of land owned by state or municipality.
352. Condemnation by corporation of another state.
353. Bridges between states.

§ 347. Federal government has power to condemn. — The Federal government, being an independent sovereignty, has the power of condemning lands within the states,[1] although this doctrine seemed to be in doubt in the earlier cases.[2] The present position of the United States Supreme Court has been clearly defined in the recent case of Kohl *v.* United States.[3] Judge Strong, in delivering the opinion, says: "There is an independent power in the Federal government to condemn lands of private persons, in the several states, for its own public use. The right is the offspring of political necessity, and it is inseparable from sovereignty, unless denied to it by its fundamental laws." The Federal government is as sovereign within its sphere as the state governments are in theirs. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. When the power to establish post-offices and to create courts within the states was conferred upon the Federal government, included in it was the power to obtain

[1] Cooley's Const. Lim. 525.

[2] Pollard's Lessee *v.* Hagan, 3 How. 212; Chesapeake Canal *v.* Union Bank, 4 Cranch C. Ct. 75. This last case was in the District of Columbia.

[3] 91 U. S. 367.

sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means, well known when the Constitution was adopted, and employed to obtain lands for public uses. The fact that the United States has not previously exercised the right does not disprove its existence. It is doubtful whether the state can condemn land for the use of the United States, as was done in the cases of Gilmer *v.* Lime Point,[1] and Burt *v.* Merchants' Insurance Company.[2] The consent of the state, although frequently granted in practice,[3] cannot be a condition precedent to its enjoyment. Such consent is only needed for the transfer of jurisdiction. The proceedings may be had in the courts of the United States, or in the state courts in the name of the United States. The practice should conform to the practice and proceedings in the state courts in like cases,[4] and may, by act of Congress, be made to conform to a particular statute of a state.[5] Judge Cooley, in the case of Trombley *v.* Humphrey,[6] anticipated the decision in Kohl *v.* United States, and decided that the state could not condemn for the use of the United States, so as to bind the United States on the amount of compensation. There is no necessity for the state to exercise the power in behalf of the United States, because the United States already has the power.[7] Judge Baldwin, in Gilmer *v.* Lime Point,[8] argues that, as a state may authorize a foreign or domestic corporation to condemn for its use, it may allow

[1] 18 Cal. 229.

[2] 106 Mass. 356.

[3] In United States *v.* Reed, 56 Mo. 565, and Reddall *v.* Bryan, 14 Md. 444, the land was condemned under state laws granting the privilege of condemning lands.

[4] Kohl *v.* United States, 91 U. S. 367; Darlington *v.* United States, 82 Pa. 382 (1876).

[5] United States *v.* Block, 121, 8 Biss. 208; Darlington *v.* United States, 82 Pa. 382 (1876).

[6] 23 Mich. 471.

[7] Trombley *v.* Humphrey, 23 Mich. 471. *Contra*, Orr *v.* Quimby, 54 N. H. 590; Burt *v.* Merchants' Ins. Co., 106 Mass. 356.

[8] 18 Cal. 229.

a foreign government, and hence may delegate to the United States, as its agent, authority to condemn for the purposes of forts, light-houses, etc. The right of eminent domain the court incorrectly supposed to be in the states alone.[1] In Reddall *v.* Bryan,[2] the court considered the uses of the general government to be public uses of the state wherein the land is condemned.

§ 348. **Clause in Constitution of the United States.** — The fifth amendment to the Federal Constitution, being on the subject of eminent domain, was designed to be a modification of the powers vested in the Federal government. It is applicable to the Federal government alone, and not to the states, except so far as it was designed for their security against the exercise of Federal power.[3] The general government cannot interfere with the discretion of the legislature of a state in the exercise of eminent domain. The state authorities must decide how much land the public convenience requires. This power may be, and is frequently, abused by the state authorities, but this gives no jurisdiction to the United States Supreme Court. In such abuse there is no violation of a contract. The party injured has recourse alone to the state courts and the state legislature.[4] The states are separate communities, and can exercise that right which every community must exercise of possessing itself of the property of the individual for public uses. The provision in the United States Constitution as to the impairment of contracts does not operate as a restriction upon the states as to the exercise of that right.[5] The exercise of the right of eminent domain on the part of the Federal government was always regarded with jealousy by the

[1] To the same effect is Boggs *v.* Merced Mining Co., 14 Cal. 279.

[2] 14 Md. 444.

[3] Withers *v.* Buckley, 20 How. 84; Barron *v.* Baltimore, 7 Pet. 243; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, *per* McLean, J.; Concord R. R. *v.* Greely, 17 N. H. 47; Renthorp *v.* Bourg, 4 Mart. (o. s.) 97; Martin *v.* Dix, 52 Miss. 53; Cairo R. R. *v.* Turner, 31 Ark. 494.

[4] Mills *v.* St. Clair Co., 8 How. 569.

[5] Fletcher *v.* Peck, 6 Cranch, 87.

states, and the unrestricted right to resort to it given by the Constitution was a leading objection to the adoption of that instrument; and so strongly was that objection grounded in the public mind, that a restraining safe-guard was deemed necessary as one of the first constitutional amendments.[1]

§ 349. **Removal of condemnation proceedings to the United States courts.** — A suit involving the condemnation of lands, where the question to be tried is the value of the land, may be removed from the state to the Federal courts, although the proceeding in its inception was an appraisement by commissioners under a charter granted by the legislature of the state.[2] The proceedings should conform to the practice of the state courts in like cases.[3] The exercise of eminent domain is not, in fact, a suit in law or equity against the state,[4] when the title is to be vested in a railroad, and not in a state. The state has no interest in that controversy, which relates only to the amount of compensation to be paid. The form of action by which proceedings are commenced does not signify. If there is a provision by which the proceedings may be brought into the State Circuit Court, it is an action when there; and if one of the parties is a non-resident of the state, the right of removal is plain. The state cannot limit the remedy to its own courts.[5]

§ 350. **Condemnation of land belonging to the Federal government.** — Land within a state, and held by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, is liable to condemna-

[1] Bogert *v.* United States, 2 Ct. of Cl. 159.

[2] Patterson *v.* Boom Co., 3 Dill. 465.

[3] Kohl *v.* United States, 91 U. S. 367.

[4] The Eleventh Amendment to the United States Constitution is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

[5] Warren *v.* Wisconsin Valley R. R., 6 Bi ss. 425.

tion for streets, highways, and as railroads,[1] like the lands of other persons. If, however, the land is occupied and used as a fort, light-house, armory, or for other public purposes, it cannot be taken for an ordinary local object, though public.[2] Lands so occupied cannot be flowed under the flowage acts. This was the doctrine in United States *v.* Ames,[3] where a mill-owner endeavored to flow back upon the premises occupied by the Springfield armory. The city of Chicago endeavored to cut streets through the ground on which Fort Dearborn was situated. The proposed streets would prostrate some of the public buildings, and materially impair the public uses to which the land was devoted. The Supreme Court of the United States[4] sustained an injunction against the city, restraining the opening of the streets. The court seemed to recognize that there must be a public object so clearly superior and paramount that preference might be given to it; but we doubt whether the Supreme Court would, at this time, countenance an effort of one of the states to condemn land occupied and used by the Federal government for public purposes. The Federal government has a certain control over railroads as post-roads, yet the railroads must be considered as the private property of the corporations building them, unless the right of way has been acquired by act of Congress, or over the public domain. Any interference with such roads, approaching a taking or occupation of their rights of way, would be unconstitutional, unless compensation was provided.[5] The grant by Congress of a right of way over public land is good against preëmptors who have not perfected that right by proving up and paying for the land,[6] or against mere squatters.[7]

[1] United States *v.* Railroad Bridge, 6 McLean, 517.

[2] United States *v.* Chicago, 7 How. 185; United States *v.* Railroad Bridge, 6 McLean, 517; United States *v.* Ames, 1 Woodb. & M. 76.

[3] 1 Woodb. & M. 76.

[4] United States *v.* Chicago, 7 How. 185.

[5] Atlantic Telegraph Co. *v.* Chicago R. R., 6 Biss. 158.

[6] Western Pacific R. R. *v.* Tevis, 41 Cal. 489 (qualifying California R. R. *v.* Gould, 21 Cal. 254).

[7] Rosa *v.* Missouri R. R., 18 Kan. 124; 4 Cent. L. J. 596.

§ 351. **Condemnation of land owned by state or municipality.** — The state may be a proprietor of lands, and when such land is taken it must be paid for. The authority to locate over lands belonging to the state, when there is no expression in the act of a design on the part of the legislature to aid the corporation by a gift of the land, is an authority to use the land on payment of compensation, and the state may institute proceedings for compensation as an individual proprietor.[1] In some states the contrary doctrine prevails, and the authority to enter on the land presumes a gift by the state.[2] In Indiana, it is considered that authority to make a road between two designated points includes the right to take, without compensation, lands belonging to the state intervening. The constitutional provision refers only to the taking of private, and not of public, property, and the company need not avoid a tract of land because it was owned by the state.[3] Such a privilege could not be extended to the taking of land already devoted by the state to another public use, such as a blind-asylum.[4] When the state grants its own lands, or rights of way over the same, the law is not one taking private property for public uses.[5] The rule which might, perhaps, apply to vacant lands owned by the state could not, in reason, apply to the taking of a ferry franchise owned by a city,[6] or to a park which a city owned in fee,[7] or to a road which had been condemned and paid for.[8]

§ 352. **Condemnation by corporation of another state.** — A foreign corporation may be authorized to condemn land within the state, although the improvement may be

[1] The Commonwealth *v.* Boston R. R., 3 Cush. 25.

[2] Pennsylvania R. R. *v.* New York R. R., 23 N. J. Eq. 157; Davis *v.* East Tennessee R. R., 1 Sneed, 94.

[3] Indiana R. R. *v.* The State, 3 Ind. 421.

[4] St. Louis R. R. *v.* Blind Institution, 48 Ill. 303.

[5] Hobart *v.* Ford, 6 Nev. 77.

[6] Benson *v.* Mayor of New York, 10 Barb. 228.

[7] Matter of Ninth Avenue, 45 N. Y. 729.

[8] The People *v.* Commissioners of Palatine, 53 Barb. 70.

operated entirely outside of the state. A water supply in one state may be condemned for the use of a canal in another state. Such an improvement may be of great use to the citizens of the state where the land lies; and, besides, the discretion of the legislature in such matters is not to be interfered with by the courts.[1] The power must be conferred in express terms. Under a general act authorizing condemnation for railroad purposes, a foreign corporation could not condemn land, nor could the owner institute proceedings against such corporation for the assessment of damages in the statutory mode. Such corporation, occupying the right of way of a home corporation, could be enjoined from operating its road until the damages due on the original taking of the right of way should be paid.[2]

§ 353. **Bridge between states.** — One state cannot condemn property or franchises in another state. All may be taken that is within its own borders. The Connecticut River is the boundary between New Hampshire and Vermont, the state line of New Hampshire being the west line of the river. A bridge across the river may be condemned by the state of New Hampshire, although the corporation owning it might be a Vermont corporation. The condemnation could extend up to the Vermont line.[3]

[1] Matter of Townsend, 39 N. Y. 171.
[2] Holbert v. St. Louis R. R., 45 Iowa, 23.
[3] Crosby v. Hanover, 36 N. H. 404.

CHAPTER XXXI.

OF DRAINAGE AND SEWERAGE ACTS.

§ 354. Improvement of swamps — Sewers.
355. Private drains.
356. Application.
357. Nature and extent of damages.
358. Pollution of stream.
359. Hearing before jury.
360. Act to be confined to drainage purposes.

§ 354. **Improvement of swamps — Sewers.** — The improvement of waste land by drainage, and the consequent improvement of the general health of the public, are such manifest and general advantages as to justify the exercise of eminent domain.[1] Statutes authorizing drainage do not authorize the withdrawal of water from the lands of one person and accumulating the water on the lands of another.[2] The sewerage of a large city may properly require the condemnation of private property;[3] and the use of the public streets for sewers is a proper use, and one contemplated in the original condemnation.[4]

§ 355. **Private drains.** — The use must be for the general public, and not for the sole benefit of private individuals, irrespective of the public welfare.[5] The public character does not depend on the number of individuals using, but the use must be common to a considerable area of country; and the

[1] See cases cited, *ante*, § 16; *In re* Ryers, — N. Y. Ct. App., 1878 (reported in N. Y. Supreme Court, 10 Hun, 93).

[2] French *v.* White, 24 Conn. 170.

[3] Hildreth *v.* Lowell, 11 Gray, 345.

[4] See *ante*, § 55.

[5] Reeves *v.* Wood Co., 8 Ohio St. 333. The doctrine of the above case would make the Missouri statute of 1877 (Myer's Supp. 147) unconstitutional. See *ante*, § 22.

ditches should not be for the sole use of the applicants, but open to the use of the general public on proper terms.[1]

§ 356. **Application.** — Application for the benefit of the drainage act must be in writing.[2] A petition for the improvement of swamps, by a "greater portion of them in interest," means the proprietors having the greatest interest in value, and not in territorial area.[3] In Indiana, the statute requires that the articles of association should show the commencement, course, and *terminus* of such proposed ditch; and the description of the lands to be affected by the construction thereof.[4] The drainage must be for the public good, and must be on "a petition signed by a majority of persons resident in the county, owning lands adjacent to such improvement."[5] The petition makes a *primâ facie* case of public necessity. The application should state the inability of parties to agree; and if the fact of failure to agree, and the reasons, be not stated, the court acquires no jurisdiction, and the proceedings fail.[6]

§ 357. **Nature and extent of damages.** — The digging of a ditch on the property of an individual is a taking of his property, and requires compensation.[6] Damages frequently result from improper and insufficient construction and maintenance of sewers and drains; but it is the scope of this work to discuss only the matter of compensation for land taken or injured by the proper construction of such public improvement. The damages for improper construction must be sought at common law.[7]

[1] Norfleet *v.* Cromwell, 70 N. C. 634.
[2] Kroop *v.* Forman, 31 Mich. 144.
[3] Henry *v.* Thomas, 119 Mass. 583.
[4] Smith *v.* Duck Pond Ditching Assn., 54 Ind. 235.
[5] Patterson *v.* Baumer, 43 Iowa, 477.
[5] Matter of Marsh, 71 N. Y. 315.
[6] The People *v.* Nearing, 27 N. Y. 306; The People *v.* Haines, 49 N. Y. 587. See cases cited under § 30, note 3.
[7] See article, "Responsibility of Municipal Corporations for Imperfect Drainage and Sewerage." 1 Southern Law Rev. (N. S.) 210: and *ante*, § 220.

§ 358. **Pollution of stream.** — In the construction of sewers, the discharge of sewage may render the waters of streams unwholesome, or unfit for manufacturing purposes. Such water and material cannot be discharged upon adjoining lands;[1] or into a private dock, thereby damaging it by the collection therein of unwholesome substances;[2] or into a mill-race.[3] Under the English Metropolis Local Management Act, compensation may be claimed for pollution of stream. For the compensation, the action must be under the statute, and not against the board; but the board were not authorized to carry the sewage of the district, by means of a new system of sewers, into the plaintiff's land, and he would be entitled to an action of nuisance.[4]

§ 359. **Hearing before jury.** — After the jury have heard the evidence, and meet to correct the assessment and make such alterations as, on the evidence, shall seem just, it is fatal error to impanel a new juror in the place of an absent juror. Such juror would not have the benefit of a personal examination of the land. The same jury should complete the examination and assessment.[5]

§ 360. **Act to be confined to drainage purposes.** — Drainage acts are to be confined to drainage of lands for agricultural purposes by means of drains or ditches, and not to levees, unless in connection with a system of drainage. The construction of a levee several miles long, along a river, cannot be said to be a drainage by drains and ditches; nor is such levee necessary to drainage of lands.[6]

[1] Lewenthal *v.* New York, 5 Lans. 532.
[2] Haskell *v.* New Bedford, 108 Mass. 208.
[3] Columbus *v.* Woollen Mills, 33 Ind. 435.
[4] Cator *v.* Board of Works, 34 L. J. (Q. B.) 74.
[5] Gilkerson *v.* Scott, 76 Ill. 509.
[6] Updike *v.* Wright, 81 Ill. 49.

INDEX.

ABANDONMENT OF PROCEEDINGS,
under the mill acts, § 309.
when proper, § 311.
as to portion of a street, §§ 311, 314.
rights of owner, § 311.
cannot be, after report is confirmed, § 312.
may be, after deposit made, where there is error in proceedings, § 312.
effect of delay in determining whether there shall be, § 313.
costs on, §§ 311, 313.
experimental assessments discountenanced, § 315.

ABANDONMENT OF PUBLIC USE,
not to be presumed, § 46.
of property of corporation renders it subject to condemnation, § 47.
devoting to private uses an, § 57.
evidence of, § 320.

ACCESS,
obstruction of, to house, a damage, §§ 192, 207.

ADDITIONAL BURDEN,
railroad on private way, § 31.
highways, turnpikes, canals, § 32.
highway on railroad, § 33.
ferry-landing on highway, § 35.
sewers, drains, etc., in streets, not, § 55.
telegraph-line for use of railroad not, on right of way, § 59.

ADJOINING OWNER,
what is reasonable use of land of, § 184.
where no land of, is taken, consequential damage, § 188.
excavation on land of, § 185.
blasting on lands of, § 186.
structures on lands of, § 187.
cut through barrier on land of, § 188.

ADJOURNMENT,
of meetings of commissioners, § 229.

ADMINISTRATOR,
can collect damages for condemnation before death of decedent, § 67.
when estate is insolvent, § 67.

ADMISSIONS,
of owner as proving value of property taken, § 172.

ADVERTISEMENT,
of notices, requisites of, § 98.

AGREEMENT OF PURCHASE,
attempt to agree generally required before condemnation permitted, § 105.
effort to agree should appear on record, § 107.
what are sufficient allegations of efforts to agree, § 107.
election not to agree, inability to agree, § 108.
waiver of agreement, § 109.
contracts of conveyance, how construed, § 110.

ALTERATION,
of road or street, § 282.

ANNUAL DAMAGES,
allowed in condemnation for mill purposes, § 299.

APPEAL,
operates as a waiver of effort to agree on purchase-price, § 109.
entry pending; when bond is given, § 136.
when entry is not allowed pending, § 137.
deposit pending, § 138.
tender pending, § 139.
separate, for separate owners, § 267.
who may; interest required, §§ 268, 269.
right to, not absolute in owner, § 322.
errors to be taken advantage of on, § 323.
limitation as to, § 344.

APPEARANCE,
waives notice of proceedings, § 97.

APPLICATION,
for road, requisites of, § 270.
for condemnation for mill-dam; conflicting applications, § 290.

APPORTIONMENT,
of rent between landlord and tenant, § 69.

ARBITRATION,
of amount of damages, § 92.
submission to, not a waiver of prepayment of damages, § 131.

ASSESSMENT,
of benefits not exercise of eminent domain, § 2.
of value of property should be of value at the time of taking, § 174.
how determined when proceedings are delayed, § 174.
of property for taxation not evidence as to value, § 172.

ASSESSMENT — *Continued.*
of damages on a taking subsequent to the improvement, § 178.
supposed to cover all damages, § 216.
of damages arising afterward, and not foreseen, § 217.
should be separate for each owner, § 267.
after construction, § 218.
(See DAMAGES; COMPENSATION.)

AUTHORITY,
to condemn not presumed; not to be extended by implication, § 48.

BENEFITS,
power to deduct, from compensation, § 149.
not taxation, but exercise of eminent domain, § 149.
classes of, § 150.
payment in, § 151.
must be direct and peculiar to be allowed, § 152.
general, not to be considered, § 153.
to railroad of establishment of highway, § 154.
from what time, calculated, § 155.
privilege of giving up entire lot and escaping assessment, § 156.
where use of property is limited, § 157.
setting off, against disadvantages, § 158.
to be set off in condemnation under mill acts, § 309.

BLASTING.
on adjoining lands, when a damage, § 186.

BOND,
appeal, without deposit does not justify entry, § 130.
of company not sufficient compensation, § 135.
to secure damages by entry pending appeal, § 186.
when given, relieves from lien of owner of land for unpaid damages, § 144.

BOND FOR DEED,
owner of, entitled to compensation, § 65.

BOOMS,
for lumber, public use, § 21.

BREAD,
regulation of price and weight of, § 8.

BRIDGE,
a public use, § 14.
condemnation of, between states, § 353.

BUILDINGS,
necessary and convenient for railroad, § 59.
materials in, ownership of, where land is condemned, § 223.
continuing erection of, after proceedings commenced, § 224.
on streets not laid out, § 225.

BURYING-GROUNDS,
public use of, § 19.
whether or not a nuisance, § 6.

CANALS,
railroad additional burden on, § 82.
water from, cannot be discharged on surrounding land, § 190.
public use of, § 14.

CATTLE-GUARDS,
railroads may be compelled to erect, without compensation, § 7.

CERTIFICATE,
of opening of road, when required, § 286.

CERTIORARI,
office of, in correction of errors, §§ 323, 333.
directed to custodian of records, § 333.

CHANGE OF GRADE,
no damages allowed for, § 195.
dissenting views, § 196.
statutes allowing damages, construction of, § 197.
(See GRADE, CHANGE OF.)

CHANGE OF VENUE,
in condemnation proceedings, § 92.

CHARTERS,
interference with rights secured by, § 38.
when, are not exclusive, § 39.
construction of, § 39.
void when compensation is disregarded, § 128.

CLAIM,
for damages, when owner fails to make, § 147.
not precluded by legislative authority to condemn, § 182.
waives question of public necessity, §§ 328, 329.

COAST SURVEY,
a public use, § 21.

COMMISSIONERS,
appointment of, § 226.
disinterested persons, freeholders, § 227.
oath of, how taken and returned, § 228.
place and time of meeting of; adjournments, § 229.
power of majority of, to act, § 230.
vacancy in board of, § 231.
supervision of court over proceedings of, § 232.
control of, over their own proceedings, § 233.
prejudice of, § 234.
conversing or discussing with, § 235.

COMMISSIONERS — *Continued.*
treating and entertaining, § 236.
power of, to admit or reject evidence, § 237.
record of, § 238.
preserving rulings of, and evidence produced before, § 239.
when report of, should be made, § 240.
review of report of; recommitting report of, § 241.
how to obtain review of report of, § 242.
presumptions in favor of regularity of proceedings of, § 243.
irregularity by, in arriving at amount of damages, § 244.
wrong principle pursued by, in estimating, § 245.
errors by, in itemized findings, § 246.

COMMON,
owner of right of, entitled to compensation, § 65.

COMPENSATION,
to be ascertained in the mode provided by the legislature, § 84.
owner cannot be forced to take easements or privileges for, §§ 112, 135.
time of payment; early doctrine, § 124.
for roads under proprietary governments, § 125.
for roads on wild lands, § 126.
fund must be adequate, § 126.
statutes and charters failing to provide, void, § 128.
must all be paid before entry, § 130.
judgment not, § 131.
right to sue not, § 132.
consideration of public welfare not, § 133.
consent of authorities cannot affect right to, § 134.
must be in money, § 135.
not in benefits, § 135.
right of subject to, recognized, § 1.
remedy against officers failing to pay, § 145.
statutes not providing, void, § 1.
refusal to take, 147.
power to deduct benefits from, § 149.
no, for negligent or tortious acts, § 220.

CONDEMNATION,
for private use, § 22.
for sale or use by others, § 23.
to prevent damage to others, § 23.
of property devoted to another public use, §§ 45, 47.
legislative authority for, must be express, § 46.
under general laws, 47.
authority for, not presumed, nor to be extended, § 48.
second, when sufficient land has not been condemned, § 58.
after completion of road, § 58.
by corporation after sale or lease of franchise, § 63.

CONFLICTING CLAIMS,
payment into court of damages, in case of, § 76.

CONSEQUENTIAL DAMAGES,
early doctrine objected to, § 181.
where no land is taken, § 183.
what is reasonable use of adjoining property, § 184.
excavations on adjoining land, § 185.
obstruction of surface-water, §§ 187, 189.
diversion of trade; loss of profits, § 191.
effect of noise, smoke, vibration, etc., § 193.
construction of statutes allowing, § 194.

CONSTITUTION,
clause in Federal, applies to United States government, § 348.

CONSTITUTIONALITY OF STATUTES,
not recognizing right of compensation, § 1.

CONSTRUCTION,
of statutes and charters, must recognize right to compensation, § 128.
allowing consequential damages, § 194.
allowing damages for changes of grades, § 197.

CONSTRUCTION OF PUBLIC IMPROVEMENTS,
liability of public for lack of skill, § 81.

CONTRACTORS FOR PUBLIC WORK,
their authority to condemn, § 60.

CONTRACTS,
impairment of, § 87.
for purchase of land, how construed, §§ 110, 114.
reservations in, for the benefit of owners, § 112.
for purchase of land, how enforced; damages for breach, § 113.
whether conditions of, are precedent or subsequent, § 113.
specific performance of, § 113.

CONVENIENCE,
of public, how determined, § 275.

CORPORATION,
property may be condemned, § 41.
use of property of, may be condemned, § 44.
express legislative authority to, § 46.
delegation to, of authority to condemn, §§ 60, 61.
delegation to, of another state, §§ 61, 352.
must be regularly organized in order to condemn, § 61.
public and private, distinction between taking by, § 126.
change of, does not relieve from payment of damages, § 144.

COSTS,
when recoverable, § 335.
what, allowed, § 336.
in discretion of trial court, § 337.
to prevailing party, § 338.
for services of county commissioners, § 339.

COUNTY COMMISSIONERS,
when entitled to compensation for services in condemnation proceedings, § 339.

COURSE OF ROAD,
how described, § 280.

COURT,
disqualification of, on account of interest, § 86.
has supervision over proceedings of commissioners, § 232.

COVENANTS,
as to lands condemned, § 37.

CROSSINGS,
highway, duty of railroad as to, § 33.
on highways subsequently constructed, § 43.
farm, duty of railroad as to, § 213.
remedy for failure to make, § 214.

DAM, (See MILLS.)

DAMNUM ABSQUE INJURIA,
nature of such damage, § 182.

DAMAGES,
nominal, to be respected, § 31.
to be assessed in mode provided by legislature, § 84.
assessment under judicial control, § 85.
assessment need not be by jury, § 91.
relinquishment of, how made, § 111.
adequacy of, measure of, § 159.
title to be considered in estimating, § 160.
must be direct and peculiar to the property, § 162.
exposure to fire from engines, to be considered. § 163.
to be estimated by jury or commissioners, § 164.
effect of taking part of tract on land left, § 166.
when estimated after the improvement is completed, § 178.
plan of improvement may be offered to show damage, § 180.
all damages considered in assessment, § 216.
arising after improvement, § 217.
unforeseen, how considered, § 217.
assessment of, after construction, § 218.
when plan is changed after assessment, § 219.
from negligent or tortious acts, not subject of compensation, § 220.
while land is unlawfully occupied, § 221.
irregularity in estimating, § 244.
wrong principle in estimating, § 245.
error in amount of, how corrected, § 246.
how, determined under mill act, § 294.
nature of, in condemnation under mill act, § 295.
annual, allowed under mill act, § 299.
nature of, under drainage acts, § 357.

DEBT,
common-law action proper, when statutory remedy not complete, § 88.

DEDICATION,
of street by plat, § 225.

DEED,
to condemning party not necessary, § 334.

DEFINITION,
of "dwelling-houses," when exempted from condemnation, § 120.
of "near" in descriptions, § 115.
of "due process of law," § 92.
of "necessary implication," § 46.
of terms "necessary" and "convenient," § 46.
of "eminent domain," § 1.
of term "laying out," § 49.

DELAY,
in proceedings should cause a new assessment, §§ 174, 318.
in determining whether or not proceedings shall be abandoned, § 318.

DELEGATION,
of eminent domain to individuals and corporations, § 60.

DEPOSIT,
pending appeal, § 188.

DEPOT GROUNDS,
streets across, § 46.

DESCENT OF PROPERTY,
laws regulating, not in exercise of eminent domain, § 9.

DESCRIPTION,
certainty required in, § 115.
quality of land, improvements, how set forth in, § 119.
of road, certainty required, § 277.
of course of road, how set forth, § 280.
(See MAPS, SURVEY.)

DESTRUCTION,
of property to prevent spread of fire, § 5.
statutes governing the same, § 5.

DISABILITY,
persons under, limitations do not run against, § 345.

DISADVANTAGES,
setting off benefits against, § 158.
allowed, what, § 162.
exposure to fire from engines, § 163.
of separating parts of a tract, houses from roads, etc., § 166.
of cutting up lands into inconvenient parcels, § 166.

DISCONTINUANCE OF PUBLIC IMPROVEMENTS,
rights of reversion and recovery of compensation paid, § 317.

DISCONTINUANCE OF ROADS AND STREETS,
rights of adjoining owners, § 318.
rights to damages when street never opened, § 319.

DISINTERESTED PERSONS,
definition of, § 227.

DISCRETION,
of corporations as to the extent of land or interest condemned, §§ 49, 62.
as to route, § 62.

DISPUTES,
settlement by legislation, § 25.

DISTINCTION,
between eminent domain and power of taxation, § 2.
war power, § 3.

DITCHES,
rendered necessary by construction of railroad, § 215.
(See DRAINS.)

DIVISION FENCES,
laws regulating, not in exercise of eminent domain, § 9.

DONATIONS OF LAND,
effect on character of use, § 24.

DOWER,
interest, inchoate and consummate, § 71.
when condemned during lifetime of husband, § 71.

DRAINAGE OF MARSHES,
public use, § 16.

DRAINS,
in roads and streets, proper use, §§ 55, 354.
private, not justified, § 355.
applications for, § 356.
nature and extent of damages from, § 357.
pollution of stream by, damage resulting from, § 358.
hearing before jury concerning, § 359.
acts in reference to, not to extend to construction of levees, § 360.

DUE PROCESS OF LAW,
definition of, § 92.

DWELLING-HOUSES,
when exempt from condemnation; "dwelling-houses" defined, § 120.

EASEMENT,
property subject to taking, § 31.
compensation when, is taken, § 50.
may be accepted as compensation, § 112.
owner cannot be compelled to take, against his will, § 112.
extent of, in public road, §§ 51, 52, 56, 276.

EJECTMENT,
will lie where statutory remedy not complete, § 88.
statutory mode is not observed by condemning party, § 90.
judgment for mesne profits does not apply on compensation in, § 90.
will lie where compensation not provided, § 128.
remedy in, lost by acquiescence, §§ 140, 141.

ELEVATORS,
regulation of, not exercise of eminent domain, § 9.
tracks to, § 21.

EMBANKMENTS,
in streets, nature of damage, § 207.

EMINENT DOMAIN,
definition of, § 1.
power of, limited as to time and amount, § 58.
whether exhausted by one exercise, § 58.
may be delegated to individuals and corporations. § 60.

ENCUMBRANCERS,
rights to compensation, § 74.

ENGINEERS,
authority to condemn, § 60.

ENTRY,
without proceedings to assess damages. § 89.
where owner can institute proceedings; where either party may, § 89.
pending appeal, §§ 136, 137.
where originally lawful, effect of delay, § 142.
on adjoining land in building road, § 285.

EQUITY,
may bring in all parties in condemnation proceedings, § 266.
cannot correct errors in proceedings, except in cases of fraud, accident, or mistake, § 323.

EQUITABLE TITLES,
holders of, protected; entitled to distribution, § 75.

ERRORS,
should be corrected by appeal or *certiorari*, not in equity, § 323.
waiver of, by owner, § 324.
condemning party, § 326.
timely objection to, must be made, § 327.
in former proceedings, not cured by subsequent proceedings, § 332.

EVIDENCE,
whether witnesses can give opinion as to amount of damages, § 165.
as to market value of property, § 168.
by expert witnesses, § 169.
sales of similar property, to prove value, § 170.
rents of similar property, to prove value, § 171.
of value, assessment for taxation not admissible as, § 172.

EVIDENCE — *Continued.*
of value, commissioners' report not admissible as, § 172.
admissions of owner as to value, § 172.
of value, present use not conclusive, § 173.
plan of proposed improvement may be offered in, to show damages, § 180.
commissioners must pass on, and may exclude, § 237.
report of commissioners may preserve rulings and, § 239.
sources of information for jury, § 253.
admissibility of; powers of jury, § 255.
of abandonment of public improvements, § 320.

EXCAVATIONS,
what allowed on adjoining land, § 185.
damages from, considered in assessment, § 216.

EXECUTORS,
interest of, in land condemned, §§ 65, 67.
of active trusts can collect damages to real estate, § 67.

EXEMPTION FROM CONDEMNATION,
of dwelling-houses; "dwelling-house" defined, § 120.
of gardens, yards, orchards, and manufactories, § 121.
of buildings, on lands sought to be condemned for mill purposes, § 289.

EXPERIMENTAL ASSESSMENTS,
discountenanced, § 315.

EXPERT WITNESSES,
qualifications of, § 169.

EXPLORATIONS,
extent authorized in a preliminary survey, § 86.

EXTENT,
of interest taken, § 49.
when, originally authorized has not been taken, whether full, can afterwards be taken, § 58.

FAILURE TO FIND DAMAGES,
operates as a judgment, § 330.

FARM-CROSSINGS,
rights of owners and condemning party in respect of, § 213.
remedy for failure to make, § 214.

FEDERAL GOVERNMENT,
has power to condemn, § 347.
limitation of clause in Federal Constitution, § 348.
condemnation by State of land belonging to, § 350.

FEE,
in lands may be taken; terms allowing the taking of, §§ 49, 50.
compensation when taken, § 50.
in public roads and streets, § 51.

FENCING,
obligations of owner and condemning party in respect of, § 212.
removal of, in construction of roads, § 285.

FERRIES,
public use, § 14.

FERRY-LANDING,
burden on highways, § 35.

FIRE,
exposure to, from engines to be considered, § 163.

FISHERY,
rights of, exist after condemnation for mill purposes, § 289.

FLOWAGE,
railroad on, an additional burden, § 32.
(See MILLS.)

FORFEITURE,
franchise subject to, must be paid for; if not, forfeited by state, § 45.
must be enforced by state alone, § 58.

FORFEITURE FOR VIOLATION OF LAW,
not exercise of eminent domain, § 8.

FRANCHISES,
interference with, §§ 38, 43.
may be condemned, §§ 41, 42.
nature of, § 42.
regulation of exercise of, § 43.
(See CHARTERS; CONTRACTS.)

FREEHOLDERS,
definition and qualifications of, § 227.
selected to act as jurors, § 248.
petition by, for road, requisites of, § 271.

GARDENS,
when exempt from condemnation; defined, § 121.

GAS-PIPES,
laying down, in country roads and city streets, § 55.

GENERAL LAWS,
condemnation under, of property devoted to another use, §§ 46, 47.
delegation to corporation under, § 61.

GOVERNMENT,
taking by, or subdivisions, distinguished from taking by a private corporation, § 126.

GRADE IN STREET, CHANGES OF,
no damages allowed for, § 195.
dissenting views, § 196.

GRADE IN STREET, CHANGES OF — *Continued.*
statutes allowing damages for, § 197.
duty of restoring property to former condition, § 198.
rendered necessary by railroad track, § 199.

GRASS,
in highways, ownership of; rights of pasturage, § 53.
(See HIGHWAYS.)

GROUND-RENTS,
condemnation of, § 25.

GUARDIAN,
of lunatic, condemnation of land in charge of, § 75.

HEALTH,
of public to be guarded by state, and facilities provided for its maintenance, § 18.
as controlling the erection of mill-dams, § 289.

HEIRS,
interest in land condemned, § 65.
entitled to notice, § 67.

HIGHWAYS,
railroad additional burden on, § 32.
additional burden on railroad, § 33.
turnpike not additional burden on, § 34.
materials in, used for repair of, §§ 52, 54.
grass in; rights of pasturage, § 53.
ownership of buildings on land taken for, § 54.
use of; construction of sewers, drains, reservoirs, markets, etc., § 55.
use of, by adjoining owner, § 56.
water-courses and springs in; rights of owners of soil to use of, § 56.
legislative control over, § 202.

HOMESTEAD,
condemnation of, § 71.

HORSE-RAILROAD,
use of street, admissible without compensation, § 205.

HOUSEHOLDERS,
petition of, for road, requisites of, § 271.

IMPAIRMENT,
of contracts, § 37.
of franchises, § 43.
(See CONTRACTS; FRANCHISES.)

IMPLICATION,
necessary, definition of, § 46.

IMPROVEMENTS,
on land, how described, § 119.
made before land is properly condemned, § 148.
right of owner to make, pending proceedings, § 816.

INCONVENIENCES,
peculiar, should be compensated for, § 162.
arising from separating portions of tract from each other, § 166.
cutting up tract into parcels, § 166.
damages to establishment occupying several blocks, § 167.
some, must be suffered for public good, § 182.
of access to property caused by improvement, § 207.
of individuals may overcome public necessity for erection of mill, § 288.
by erection of mill-dam require compensation, § 298.
(See CONSEQUENTIAL DAMAGES.)

INDIVIDUALS,
profit of, from public improvement does not impair the public character of the improvement, § 13.
number to be benefited to make use public, § 22.
inconvenience of, considered, to overbalance public necessity of an improvement, § 288.

INFANTS,
condemnation of property and protection of rights of, § 72.

INGRESS,
to property, obstruction of, § 207.

INJUNCTION,
by owner, when condemning party does not follow statute, § 90.
when compensation not provided, § 128.
when damages not prepaid, § 130.
remedy by, lost by acquiescence, § 141.
when entry is made by consent, but damages not paid, § 142.
when there has been sale or lease to corporation, until damages are paid, § 144.

INSURANCE,
increase in rate to be considered in damages, § 168.

INTEREST IN EVENT OF SUIT,
disqualification of court having, § 86.
commissioners having, § 227.
jurors having, § 249.
what sufficient, to justify appeal, § 269.

INTEREST,
extent of, condemned, § 49.

INTEREST ON AWARD,
when allowed, § 175.

INTERFERENCE,
with use before taking, § 176.
during construction, §§ 177, 192.
with buildings by mill-dam not allowed, § 289.

INTERRUPTION OF BUSINESS,
by construction, § 192.

ITEMIZED FINDING,
of damages recommended, §§ 246, 257.

JOINDER OF PARTIES TO ACTIONS,
of defendants. § 261.
of tenants in common, § 262.
of joint owners. § 263.
of town. in road openings, § 264.
of officers engaged in condemnation proceedings, § 265.
equity may bring in all parties, § 266.
of owners of mills, in actions for damages, § 305.
of owners of lands condemned for mill purposes, § 305.

JOINT TENANTS,
how treated in proceedings to condemn, § 268.
interest of, in land condemned, how ascertained, § 78.

JUDGMENT,
not compensation of itself, § 131.
failure to find damages operates as a, that there are no damages, § 330.

JUDGMENT-CREDITORS,
do not have a lien on damages, § 74.

JUDICIARY,
control the ascertainment of the amount of damages, § 85.

JURISDICTION,
acquired by notice on parties, § 95.

JURY,
may be the tribunal to assess damages, § 85.
not the only tribunal; constitutional requirements, § 91
right to jury-trial on appeal, § 91.
how, should be summoned, § 247.
qualifications of jurors. freeholders, § 248.
disqualification of, from interest, § 249.
should be sworn, § 250.
when objections to, must be made, § 251.
similar issues submitted to the same, § 252.
sources of information of, § 253.
may view property taken, § 254.
proceedings before, § 255.
decision of majority of, § 256.

JURY — *Continued.*
itemizing verdict of, averaging, § 257.
setting aside verdict of, § 259.
reassessment by, § 260.
right to trial by, may be waived, § 325.
hearing before, under drainage acts, § 359.

LAKES,
rights of owners bordering on, § 88.

LANDING,
railroad an additional burden on, § 82.
burden on highway, § 35.

LANDLORD AND TENANT.
considered owners, § 65.
distribution of damages awarded, § 68.
value of estates, how estimated, § 68.
apportionment of rent, § 69.
loss of rent during construction, § 192.
rebuilding, when part of building leased is taken, § 70.

LATERAL RAILROADS,
condemnation for; constitutionality of practice, § 28.

LAYING OUT,
of roads must be according to petition, § 283.

LEASE,
land under, condemned; measure of damages, § 87.

LEGATEES,
considered owners, § 65.
residuary legatees entitled to notice, § 78.

LEGISLATURE,
has power to determine necessity and extent of exercise of eminent domain, §§ 11, 49.
cannot limit its power to subsequently condemn, § 40.
must give express authority to condemn property devoted to another public use. § 46.
to provide remedy, § 84.
may control and modify existing laws so as to affect pending proceedings, § 93.
cannot exclude claim for damages, § 182.

LESSEE,
considered an owner, § 65.

LESSORS OF RAILROADS,
may be made responsible for acts of lessees, § 7.
power of, to carry on condemnation proceedings, § 68.

LEVEE,
railroad an additional burden on, § 82.

LICENSES,
to corporations subject to revocation, § 88.
to owners granted by corporations, § 111.
to corporations granted by owners, when revocable, § 111.

LIEN,
holder of, entitled to compensation, § 74.
owner has, on land until damages paid, § 144.
when subsequent party purchases franchise, § 144.
(See JUDGMENT-CREDITORS.)

LIGHT,
obstruction of, a damage, § 207.

LIMITATION
on actions and payment of damages under mill acts, § 310.
on awards may be shorter than the, on other actions, § 340.
prompt adjustment may be reasonably required, § 340.
from what time the statute should run, § 341.
on pendency of proceedings, § 343.
on reports and appeals, § 344.
excuses for failure to comply with statute, § 345.
absence of special statute of, § 346.

LIQUORS,
forfeiture of, for violation of law, § 8.
manufactories of, reduced in value by prohibition laws, § 8.

LOCATION,
priority of, in time, gives priority of right, § 47.

LUNATIC,
condemnation of land of, § 75.

MAJORITY,
decision of, of commissioners, § 230.
of jury, § 256.

MANDAMUS,
officers may be compelled to pay damages by, § 145.
tribunal may be compelled to make a finding by, § 331.
issue warrants or do ministerial acts by, § 331,

MANUFACTORIES,
when exempt from condemnation; "manufactory" defined, § 121.

MAPS,
of land to be taken when required, § 62.
certainty of description required in, §§ 115, 117.
need not show whole road, or entire tracts of land, § 118.

MARKET VALUE,
what witnesses are competent to prove, § 168.
not estimated from assessment for taxation or commissioners' report, § 172.
effect of admissions of owner in determining the, § 172.
not to be estimated solely from present use, § 178.

MARKETS,
use of highway as a stand for market-wagons, § 55.

MARRIED WOMEN,
interest of, in land condemned, where separate estate, §§ 65, 71.

MARSHES,
drainage of; public character of use, § 16.

MATERIALS,
in highways, ownership of; use of, for repair of highway, § 54.
necessary to public work may be condemned, § 123.
in right of way of railroad, ownership of, § 210.

MEETINGS,
of commissioners, place and time of; how adjourned, § 229.

MILLS,
public character of, §§ 15, 287.
necessity of; private inconvenience, § 288.
effect upon health; right of fishery; interference with buildings, § 289.
conflicting applications; improvement by owner; prescriptive rights, § 290.
statutory remedy excludes common-law remedy, § 291.
when statutory remedy is not adequate, § 292.
failure to comply with statute, §§ 292, 297.
mill act protects from indictment, § 293.
how damages are determined, § 294.
nature of damages, § 295.
damage to another mill-site, § 296.
damage below dam, § 296.
damages allowed for inconveniences resulting, § 298.
annual damages, § 299.
benefits to be considered, § 300.
use by owner of lands flowed, § 301.
reservoir for dam; outlets, § 302.
height of mill-dam, § 303.
must be built to justify condemnation, § 304.
practice as to joinder of owners of, and owners of lands, § 305.
transfer of dam; liability of vendee, § 306.
land flowed; claim for damages, § 307.
regularity of proceedings, § 308.
abandonment of proceedings, § 309.
limitation on actions and on payment of damages, § 310.

MINERALS,
in land taken for roads or streets, § 52.

MINES,
encouragement of public use, § 20.
working of mines under public road, § 52.

MISTAKE,
in failing to condemn lands; ownership of improvements, § 148.

MORTGAGEORS AND MORTGAGEES,
considered owners, § 65.
distribution of fund among, § 74.
notice to, of proceedings to condemn; questions of record-title, § 103.
mortgagee of railroad franchises must pay land damages on foreclosure, § 144.

MUNICIPAL CORPORATIONS,
charters of, not contracts, § 38.
condemnation of property of, §§ 38, 351.
contracts of, not to condemn, § 40.
condemnation of land belonging to, § 351.

NECESSARY BUILDINGS, ETC.,
definition of, § 59.

NECESSITY,
legislature determines, of exercise of eminent domain, § 11.
imperative, what considered, § 127.
when to be determined by the courts, § 11.
when found by commissioners or juries, § 275.
of mill; private inconvenience, § 288.

NECESSITY, OVERRULING,
taking by virtue of, § 4.

NEGLIGENCE,
damages from, not subject of compensation, §§ 80, 220.

NEIGHBORHOOD ROADS,
condemnation for, § 26.

NOISE,
considered as a damage to property, § 193.

NOMINAL DAMAGES,
to be regarded, § 31.

NON-RESIDENTS,
notice of proceedings, how given to, § 98.

NON-USER,
evidence as to abandonment, § 320.

NOTICE,
not absolutely necessary, § 95.
generally required to give jurisdiction, § 95.
by whom given, § 95.

NOTICE — *Continued.*
necessity of giving, inferred by provisions of statute, § 96.
waiver of, by appearance, § 97.
by publication and by posting, § 98.
by advertisement and by mail, § 98.
what constitutes reasonable, § 99.
what, should contain, § 100.
service and return of, § 101.
new, of new proceedings, § 102.
to known owners, § 103.
to unknown owners, § 104.

NUISANCE,
condemnation of property as a, § 6.
province of courts in deciding what is a, § 6.

OATH,
of commissioners, how taken and returned, § 228.
of jurors, how taken, § 250.

OBSTRUCTION,
of work after damages tendered, § 147.

OCCUPATION,
of condemning party must correspond with location, § 122.
damages for unlawful; how considered, §§ 221, 222.

OCCUPYING CLAIMANTS,
laws regulating, not in exercise of eminent domain, § 9.

OFFICERS, PUBLIC,
authority of, to condemn, § 60.
immunity of, from actions of trespass, § 64.
may be compelled by *mandamus* to pay damages, § 145.
pursuing statutory authority, not tort-feasors, § 265.
refusal of, to lay out road, § 272.

OIL,
lines of tubing for transportation of; public use, § 14.

OPEN AND CLOSE OF PROCEEDINGS,
rights of parties, § 92.

OPENING OF ROAD,
when certificate of, required, § 286

ORCHARDS,
when, exempt from condemnation; "orchard" defined, § 121.

ORNAMENTAL PURPOSES,
taking for, when justified, § 18.

OUTLETS FOR DAMS,
land may be condemned for, § 302.

OWNERSHIP,
public need not own improvement for which land is condemned, § 13.
classes of, § 65.

OWNERSHIP — *Continued.*
duty of condemning party to ascertain, §§ 77, 103.
names of owners must be set out distinctly, § 77.
notice to known owners, how given, § 103.
unknown owners, how given, § 104.
duty of examination of records, § 103.
of improvements made during unlawful occupation, § 148.
on land condemned, § 223.
right of owner to improve property pending condemnation, §§ 148, 816.

PARKS,
for particular territory justified, § 12.
public character of, § 18.

PARTITION LAWS.
not in exercise of eminent domain, § 9.

PARTIES TO ACTIONS,
joinder of defendants, § 261.
tenants in common, § 262.
joint tenants; joint interests, § 263.
town a proper party in road openings, § 264.
public officers engaged in condemning property are not tort-feasors, § 265.
all parties may be brought in, § 266.

PARTY-WALLS,
laws regulating, not exercise of eminent domain, § 9.

PASTURAGE,
in roads and streets, § 53.

PAYMENT,
of damages by promoters of undertaking: effect on character of use, § 24.
into court for benefit of unknown owners and conflicting claims, § 76.
of damages; distinction between public and private corporations as to time of, § 126.
of damages may be enforced by *mandamus*, § 145.
to wrong claimant, § 146.
may be made in benefits, § 151.

PETITION,
of householders for road, requisites of, § 271.

PLAN,
of improvement may be offered in evidence, § 180.
how damages are estimated after change in, § 219.

PLANK-ROAD,
turnpike on, § 34.

PLEASURE-DRIVES,
may be provided, § 18.

POLICE POWER,
distinction between, and eminent domain, § 7.

POLICY OF CONDEMNATION,
not a judicial question, § 11.

POLLUTION,
of stream; compensation for, § 358.

PONDS,
rights of owners of land on, § 83.

POSSESSION,
how obtained after condemnation, § 384.

POSTING OF NOTICES,
requisites of, § 98.

PREJUDICE,
of commissioners invalidates proceedings, § 234.

PRELIMINARY OCCUPATION,
allowed in Maine without prepayment of damages, § 129.

PRELIMINARY SURVEY,
when allowed, § 36.

PREPAYMENT OF DAMAGES,
early doctrine, § 124.
required of private corporations, § 126.
when damages cannot be estimated in advance, § 127.
not required for preliminary occupation, § 129.
condition precedent to entry, § 130.
waiver of, by allowing entry, § 140.
continued use, § 141.

PRESCRIPTIVE RIGHTS.
in mill-dams, how gained and lost, § 290.

PRESENT USE,
as affecting value of property taken, § 178.

PRINCIPLE,
wrong, in estimating damages, § 245.

PRIVATE USE,
definition of, § 22.

PRIVATE WAYS AND ROADS,
definition of, § 26.
lawful when public may use, § 12, 27.
railroad on, § 31.
obstruction of, by railroad, § 211.

PROCEEDINGS.
must be strictly according to statute, § 87.
initiative in, by condemning party or owner, § 89.
rules governing, § 92.
modified by subsequent legislation, § 93.
new notice should be given of new, § 102.

PROCEEDINGS — *Continued.*
of commissioners, presumption of regularity of, § 248.
control of jury over their own, § 255.
separate assessments, verdicts, and appeals, § 267.
regularity of; waiver of errors under mill act, § 308.
effect of pendency of, on right of owner to improve property, § 316.
limitation on pendency of, § 348.

PROFITS,
loss of, where owner is compelled to remove, § 177.
where use of property is interfered with during construction, § 177.
generally *damnum absque injuria*, § 191.

PROFITS OF PUBLIC IMPROVEMENTS,
may go to individuals, §§ 13, 14.

PUBLIC CONVENIENCE,
when determined by commissioners or jury, § 275.

PUBLIC USE,
how many must use to make the use public, § 12.
improvements unknown to framers of constitution, § 21.
province of legislature and of the courts, § 10.
subsequent, superseding prior, § 45.
cessation of, for private uses, § 57.
question of ability of public to maintain road, effect on question of, § 274.
public necessity, finding of, by commissioners, § 275.

PUBLICATION OF NOTICES,
requisites of, § 98.

PURCHASE,
property should be purchased rather than condemned, § 105.
tender of damages, § 106.
allegations of efforts to, § 107.
construction of contracts of, § 110.
specific performance of contracts of, § 113.

PURCHASER,
of franchise must pay damages assessed on taking of land, § 144.

QUALITY,
of land, how set forth, § 119.

RAILROAD,
highway an additional burden on, § 33.
duty of, to make bridges, embankments, etc., for crossings, § 33.
buildings necessary for, § 59.
public use, § 14.
streets condemned across track of, § 45.
no benefit to, of establishment of highway, § 154.

RAILROAD — *Continued.*
condemnation of part of, § 47.
regulation of tolls of. § 14.
crossings, cattle-guards, and running of trains of, § 43, 45.
connecting, §§ 43, 44.
rights of connecting, § 44.
use of land condemned by, for private purposes, § 57.
terminal facilities necessary for, § 59.
damage for taking part of, § 179.
restoring property to former condition; duty as to streets and crossings, §§ 198, 199.
use of streets; improved method of use, §§ 200, 201.
obstruction of street by, § 200.
use of streets by, when fee is in the public, § 203.
adjoining owner, § 204.
control over right of way by; rights of former owner, § 208.
may erect telegraph-line on right of way, § 209.
track need not be in centre of right of way, § 211.
obstruction of private ways, § 211.
obligations as to fencing, § 212.
farm-crossings, §§ 213, 214.
bridges over cuts, and as to ditches, § 215.

REASSESSMENT,
by jury, when ordered, § 260.

RECEIVER,
damages for lands in hands of, § 75.
may be appointed when corporation fails to pay damages, § 141

RECORD,
of commissioners must show proceedings, § 235.
may preserve rulings and evidence, § 239.

REFERENCE,
of assessment of damages to referee, § 92.

REGULATION,
of use of private property, § 9.

RELINQUISHMENT,
of damages, how effected, § 111.

RELOCATION,
damages to be paid, § 321.

REMAINDER-MEN,
interest in land condemned, § 78.

REMEDY,
provided by legislature, § 84.
statutory, exclusive, § 87.
at common law remains when statutory, not complete. §§ 88, 292.

REMEDY — *Continued.*
when statutory, not followed by condemning party, §§ 90, 292, 297.
whether corporation has any right in existing, § 93.
in mill acts excludes common-law, § 291.
following statutory, relieves from indictment, § 293.

REMOVAL OF PROCEEDINGS,
may be had from state to Federal courts, § 349.

RENT,
apportionment of, between landlord and tenant, § 69.
depreciation in, caused by public improvement, a ground of damages, § 177.

REPORT OF DAMAGES,
effect of confirmation of, § 93.
when commissioners', should be made, § 240.
reviewing and recommitting, § 241.
how to obtain review of, § 242.
presumptions in favor of regularity of proceedings, § 243.
limitation on presentation of, § 344.

RESERVOIRS,
in streets and highways, § 55,
when necessary to mill-dams, may be condemned, § 302.

REVERSAL,
of proceedings on appeal, effect of, § 93.

REVERSION,
of property after public use has ceased, § 32.
of highway with railroad on it, § 32.
on devotion of property to private use, § 57.
no, on change of use, when the use is substantially the same, § 57.
no recovery back of compensation paid in case of, § 317.
does not apply to property impressed by war power, § 8.

REVIEW,
of report, when ordered, § 241.
how to obtain a, § 242.

RIGHT OF WAY,
contract for, how construed, § 110.
contract for, how enforced; damages for breach, 113.
control of railroad over its, § 208.
use of, by former owner, § 208.
telegraph-line an encroachment on, § 209.
to whom materials belong in, § 210.
track need not be in centre of, § 211.

RIPARIAN OWNERS,
may be compelled to keep up levee, § 7.
rights on tide-waters, § 78.

RIPARIAN OWNERS — *Continued.*
rights of, generally defined, § 79.
improvement of navigable rivers, § 80.
streams not navigable, § 81.
rights of, between low and high water-mark, § 82.

RIVER,
improvement of navigable, § 80.
changes in bank of, § 80.
rights between low and high water-mark, § 82.

ROAD,
a public use, § 14.
not solely for business travel, § 27.
reversion of, to owner on discontinuance of public use, § 51.
when fee of, in adjoining owner; when in public, § 51.
minerals in land taken for, § 52.
materials in, taken for repair of, §§ 52, 54.
timber and grass in; rights of pasturage, § 53.
ownership of buildings on land taken for, § 54.
construction of sewers, gas-pipes, drains, reservoirs, and markets in, § 55.
under proprietary governments, § 125.
compensation for, on wild lands, § 125.
application for, § 270.
petition of householders or freeholders, § 271.
refusal of officers to lay out, § 272.
an encumbrance on land, § 273.
ability of public to maintain, § 274.
necessity of, how determined, § 275.
extent of easement acquired in, § 276.
description of, § 277.
termini of, how described, § 278.
terminus need not be on highway, § 279.
course of, § 280.
widening and straightening, § 281.
alteration in, § 282.
must be laid out as petitioned for, § 283.
must be built as laid out, § 284.
entry on adjoining land; removal of fences, § 285.
certificate of opening of, § 286.
discontinuance of; damages to owner, § 318.
damages on discontinuance of proceedings before opening of, § 319.

ROUTE,
change of, after location, § 58.
caused by difficulty of construction, § 58.

RULINGS,
of commissioners to be preserved in record, § 239.

SALE,
condemnation for, to others, § 23.
condemnation by corporation after, of its franchise, § 68.
of similar property evidence as to value of property taken, § 170.

SCHOOL-HOUSE AND YARDS,
a public use, § 17.

SELECTION OF ROUTE,
right impaired by subsequent grant, § 38.
when condemnation is under general laws, § 47.
priority of location, § 47.
discretion of corporations, § 62.

SERVICE OF NOTICES,
how made and returned, § 101.

SEWERS,
construction of, in roads and streets, §§ 55, 854.
cannot be discharged on land of another, § 190.
use is public, § 854.

SIDE TRACKS,
necessary, definition of, §§ 58, 59.

SMOKE,
considered as a damage to property, § 193.

SPECIFIC PERFORMANCE,
of contracts of conveyance of rights of way, § 113.

SPRINGS,
in highways; rights of owners of soil, § 56.
damages to, considered in assessment, § 216.

STATE,
takes a fee in land condemned for its use, § 50.
condemnation of lands owned by, § 351.
when lands owned by, are used for public purposes, § 351.
condemnation by corporation of another, § 352.
bridge between states, § 358.

STATUTES,
construction of, in favor of owner, § 84.
remedy provided by, exclusive, § 87.
allowing consequential damages, construction of, § 194.

STATUTORY REMEDY,
exclusive, § 87.
when not complete, common-law remedy remains, § 88.

STOCK,
condemnation of shares of, § 42.

STOCK, LIVE,
frightening of, considered as a damage to property, § 193.

STREAM,
diversion of; improvement of, not navigable, § 81.
rights between low and high water-mark, § 82.
must not be obstructed, §§ 187, 189.
cut through barrier which protects from, § 188.
discharging contents of, on another's land, § 190.
damages for diversion of, when considered by commissioners, § 216.
damages from pollution of, § 358.

STREET,
through depot grounds, §§ 33, 46.
fee of, in adjoining owner; sometimes in the public, § 51.
minerals in land taken for, § 52.
materials in, taken for repair of, §§ 52, 54.
timber and grass in; rights of pasturage, § 53.
ownership of buildings on land taken for, § 54.
construction of sewers, gas-pipes, drains, reservoirs, markets, etc., in § 55.
changes of grade in; no damages allowed for, § 195.
dissenting views, § 196.
statutes allowing damages for changes of grade in, § 197.
restoring property on, to former condition, § 198.
change in, rendered necessary by railroad track, § 199.
use of, by railroads, § 200.
legislative control over, § 201.
use by railroad, where fee is in public, § 203.
adjoining owner, § 204.
easement of adjoining owner in; right of access to, §§ 206, 207.
embankments in, § 207.
widening and straightening, § 281.
discontinuance of; claim of adjoining owner for damages, § 318.
damages when discontinuance occurs before entry, § 319.
(See GRADE, CHANGE OF; HORSE-RAILROADS.)

SUPPORT,
of neighboring soil, when required, §§ 185, 187.

SURFACE-WATER,
obstructed by structures, § 187.
may be diverted from land of owner upon that of another, § 189.

SURRENDER,
of land by owner, in preference to payment of benefits, § 156.

SURVEY,
filing of, when required, § 116.

TAKING,
depreciation of property a taking, § 80.
of more than the public needs, § 49.
evidence of time of, § 342.

TAXATION,
definition of, § 2.
distinction between, and eminent domain, § 2.

TAX-PAYERS,
interest of, in opening of roads, when their land is not taken, § 269.

TELEGRAPH-LINE,
necessary for railroad, § 59.
public use, § 21, note 1.
when, may be erected on right of way of railroad, § 209.

TEMPORARY USE OF PROPERTY,
rules regulating the, § 49.

TENANTS IN COMMON,
notice to, of proceedings to condemn, § 103.
how joined in proceedings to condemn, § 262.

TENANTS FOR LIFE,
interest of, in land condemned, § 65.
rules of estimating the, § 73.

TENDER,
of damages, effect of; does not justify entry, § 106.
pending an appeal, when allowed. § 139.
to owner, who refuses to take, justifies entry, § 147.

TERMINAL FACILITIES,
of railroads, definition of, § 59.

TERMINI,
description of, when sufficient, § 115.
of public road, how described, § 278.
need not be on highway, § 279.

TIMBER,
in roads and streets; rights of owner of fee, § 53.

TIDE-WATERS,
interference with; bridges across, § 78.

TITLE,
damages must be paid according to true ownership, § 146.
to be considered in estimating damages, § 160.
remedy when ownership is not properly stated in proceedings, § 160.
owner's, cannot be disputed by condemning party; exceptions, § 161.

TOLLS,
of public improvement may be collected by individual or corporation, § 18.
toll-house in highway; proper use of highway, § 55.

TORTS,
no compensation for tortious acts, § 220.

TOWN,
a proper party to proceedings to open roads, § 264.

TRACT,
effect of taking part of, on land left, § 166.
extent of; establishments occupying several blocks, § 167.

TREATING,
commissioners, generally invalidates proceedings, § 286.

TRESPASS,
public officers engaged in condemnation are free from actions of, § 64.
will lie when statutory remedy is not complete, § 88.
followed by condemning party, § 90.
payment of damages in, does not apply on compensation, § 90.
will lie when occupation varies from location filed, § 122.
when compensation not provided, § 128.
damages for, on adjoining lands, § 222.
unlawful occupation of land, § 221.

TRIBUNAL,
to assess damages must be under judicial control, § 85.
whether jury or commissioners, §§ 85, 91.
disqualification of, on account of interest, § 86.

TRUSTEES,
considered owners, § 65.

TURNPIKE,
railroad additional burden on, § 82.
not additional burden on highway, § 84.
may be condemned for highway, § 45.

UNITED STATES,
has power to condemn property for governmental use, § 347.
limitation of clause in Constitution of, § 348.
proceedings may be removed from state to, courts, § 349.
condemnation of land belonging to, § 350.

UNKNOWN OWNERS,
payment into court of damages for, § 76.

USE OF PROPERTY,
regulation of, § 9.
by owner after condemnation for mill purposes, § 301.

VALUE,
market, how proved, § 168.
proved by sales of similar property, § 170.
rents of similar property, § 171.
effect of assessment for taxation, commissioners' report, and admissions of owner in fixing, § 172.
not estimated solely from present use, § 173.
estimate should be of, at the time of taking, § 174.

VENDOR'S LIEN,
exists when damages are not paid, § 187.

VENDOR AND VENDEE,
claim of, to damages for land condemned, § 66.
damages for improper construction go to vendee, § 66.
claim for damages against, of mill-dam, § 306.
of, of land condemned, § 307.

VENUE,
change of; effect of, in condemnation proceedings, § 92.

VERDICT,
may be decision of majority of jury, § 256.
itemizing damages in; averaging testimony in, § 257.
conditions in, § 258.
setting aside, § 259.
separate, for individual owner, § 267.

VIBRATION,
considered as a damage to property, § 198.

VIEWERS,
when there may be jury of, § 254.
duties of jury of, § 254.

WAIVER,
of notice by appearance, § 97.
of agreement or effort to purchase, § 109.
of damages, § 111.
of prepayment by allowing entry and use, §§ 140, 141.
simple acquiescence not a, of damages, § 143.
of objection to jurors, § 251.
of errors in condemnation under mill act, § 308.
of irregularities in proceedings, § 324.
of right of trial by jury, § 325.
of errors by condemning party, § 326.
claiming damages is, § 328.
receiving damages is, § 329.

WAR,
damage by enemy's troops, § 8.
by friendly troops, § 8.
destruction to prevent property falling into hands of enemy, § 8.

WAREHOUSES,
public character of, § 21.

WARRANTIES,
as to lands condemned, § 87

WATER-COURSES IN HIGHWAYS,
rights of owners of soil, § 56.

WATER-POWER,
condemnation for, § 23.

WATER-WORKS,
may be provided for particular town, § 12.
use of streets for water-pipes; proper use, § 55.
public character of use, § 18.
right of municipal corporation owning bank of stream to take supply of water, § 79.

WAYS OF NECESSITY,
definition of; legislation concerning, § 29.

WAYS, PRIVATE,
justified where public may use, § 12.
owners of, entitled to damages when condemned, § 65.

WELL,
damage to, by construction of improvement, § 185.

WIDENING,
of roads and streets, § 281.

WIDOWS,
interest of, in land condemned, § 65.

WITNESSES,
who may prove market value, § 168.
qualifications of expert, § 169.

YARDS,
when, exempt from condemnation; "yard" defined, § 121.

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